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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 604

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., ETC., APPELLANTS,

vs.

G. A. F. SEELIG, INC.

No. 605

G. A. F. SEELIG, INC., APPELLANT,

vs.

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., ETC.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED DECEMBER 17, 1934.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1935.

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-174

G. A. F. SEELIG, INC., Plaintiff,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, and others, Defendants

STIPULATION AS TO TRANSCRIPT OF RECORD

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States the solicitors for the respective parties to the appeal and cross-appeal herein designate the following documents as constituting the true and complete transcript herein, for the purpose of both appeals:

1. Bill of Complaint, verified by Walter J. Seelig, May 28, 1934, including following exhibits:

A. Ch. 158 of N. Y. Laws of 1933.
B. Official Order No. 17.
C. Official Order No. 33.
D. Ch. 126 of N. Y. Laws of 1934.
E. Sections 39-41 of A. & M. Law.

2. Affidavits of J. Daniel Dougherty and Walter J. Seelig, verified May 28, 1934, including two letters made exhibits.
3. Order to show cause, dated May 31, 1934.
4. Answering affidavit of Kenneth F. Fee, verified June 7, 1934, including three exhibits as follows:

A. Contract between Seelig corporations.
B. Table of alleged underpayments.
C. Receipts of milk in New York City market in April, 1934.

[fols. b & c] 5. Opinion of Circuit Judge Learned Hand dated August 2, 1934.

6. Submission of motions and stipulation of facts, including five exhibits as follows:

A. (Identical with 4-A above).
B. (Identical with 1-B above).
C. (Identical with 1-C above).
D. (Identical with 4-B above).
E. (Identical with 4-C above).

7. Final decree dated November 16, 1934.
8. Petition for appeal and assignment of errors.
9. Petition for cross-appeal and assignment of errors.
10. Joint statement as to jurisdiction.
11. Order allowing appeal and cross-appeal.
12. Citation on appeal.
13. Citation on cross-appeal.
14. This stipulation.

Dated December 14, 1934.

Henry S. Manley, Solicitor for Defendants, as Appellants and as Cross-Appellees. John J. O'Connor, Solicitor for Plaintiff, as Cross-Appellant and as Appellee.

So ordered.

Robert P. Patterson, U. S. D. J.

[fol. 1] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-174

G. A. F. SEELIG, INC., Plaintiff,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, Defendants

BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:

G. A. F. Seelig, Inc., bring this its bill of complaint against Charles H. Baldwin, as Commissioner of Agricul-

ture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, and respectfully shows unto your Honors, as follows:

[fol. 2] First. The plaintiff, G. A. F. Seelig, Inc., was at all times hereinafter mentioned and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, a citizen and resident of said State, and a resident of the Southern District of New York.

Second. The defendant, Charles H. Baldwin, is the duly appointed, qualified and acting Commissioner of Agriculture and Markets of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Commissioner in the Southern District of New York.

Third. The defendant, Kenneth F. Fee, is the duly appointed, qualified and acting Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Director in the Southern District of New York.

Fourth. The defendant, John J. Bennett, Jr., is the duly elected, qualified and acting Attorney General of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Attorney General in the Southern District of New York.

Fifth. The defendant, William C. Dodge, is the duly elected, qualified and acting District Attorney of the County of New York and is a citizen and a resident of said State. The defendant, William C. Dodge, as District Attorney as aforesaid, maintains his offices for the regular conduct of [fol. 3] his duties as such District Attorney in the Southern District of New York.

Sixth. The ground upon which the jurisdiction of this Court depends is that this suit is one of a civil nature in

equity and arises under the Constitution of the United States, as will hereinafter more fully appear. The amount in controversy in this suit exceeds the sum or value of Three thousand dollars ($3,000.00), exclusive of interest and costs.

Seventh. The plaintiff is engaged and at all times hereinafter mentioned and for many years prior to April 10, 1933, was continuously engaged in the business of purchasing and handling and selling fluid milk and cream in and about the City of New York, State of New York, said City having a population of over one million inhabitants. The plaintiff has built up a large and extensive business in the said City in the sale of fluid milk, chiefly in can lots, to consumers and to hospitals, grocery stores, hotels, restaurants, soda fountains, dairy products stores and similar mercantile establishments, and has owned and operated a plant in the Borough of Manhattan, City of New York, for many years, for the distribution and sale of fluid milk and cream in and about the City of New York, in wholesale lots, that is, chiefly in "can lots," as distinguished from bottled milk, as hereinabove stated.

Eighth. The plaintiff, in handling approximately 20,000 pounds of milk daily, is, in comparison with others engaged in the same branch of the milk business in New York City, one of the smaller milk dealers. The said plaintiff purchases, under contracts which are renewed annually, all the [fol. 4] output of milk of the Seelig Creamery Corporation. The said Seelig Creamery Corporation is a corporation organized and existing under the laws of the State of New York, but doing no business within the State of New York. It owns and operates a creamery for the processing of milk at Fair Haven, in the State of Vermont, and conducts all of its operations at that place, its business being conducted under and pursuant to the laws of the State of Vermont as a foreign corporation in that state, licensed to do business in and by the said State of Vermont, and under and pursuant to the laws of Vermont governing the operations of creameries in that State. The said Seelig Creamery Corporation is not a producer of milk, but buys from certain selected farmers or producers of the Milk Shed in and about Fair Haven, Vermont, all the milk offered to it daily. The operations of the said Seelig Creamery Cor-

poration are confined wholly to the State of Vermont, and at all times hereinafter mentioned and for many years prior to April 10, 1933, said Seelig Creamery Corporation so conducted its business. The plaintiff and said Seelig Creamery Corporation are, and at all times hereinafter mentioned were, wholly separate and distinct corporate entities and neither corporation owns, holds or controls stock in the other.

Ninth. On April 10, 1933, and at all times hereinafter mentioned, the plaintiff was continuously engaged in the business of importing, selling and distributing fluid milk and cream in the City of New York, which milk and cream was and is purchased from said Seelig Creamery Corporation, F. O. B. Fair Haven, Vermont, and from other creameries situated at that place.

[fol. 5] Tenth. The plaintiff has duly obtained from the Board of Health of the City of New York all such licenses and permits as are required by the Sanitary Code of the said City or the regulations adopted thereunder for the lawful conduct of the plaintiff's said business, and the plaintiff has duly kept, observed and performed all the provisions of said Sanitary Code and the regulations adopted thereunder.

Eleventh. On or about the 10th day of April, 1933, the Governor of the State of New York approved Chapter 158 of the Laws of 1933, enacted by the Legislature of said State, which said chapter amended the Agriculture and Markets Law, being Chapter 69 of the Consolidated Laws of New York, by adding thereto a new Article 25. A full, true and correct copy of said Chapter 158 of the Laws of 1933 is annexed hereto and marked "Exhibit A" and made a part hereof.

Twelfth. In and by the said Article 25 (Exhibit A), a new temporary state agency, known as the Milk Control Board, was created, to continue in existence until March 31, 1934, and was given power until said date to regulate as the emergency required all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the State of New York. It was further provided in and by the said Article 25 that the said Milk Control Board should fix by of-

ficial order the minimum wholesale and retail prices, and might fix by official order the maximum wholesale and retail prices, to be charged for milk handled within the State of New York for fluid consumption.

[fol. 6] Thirteenth. In and by sub-section "(g)" of Section 312 of said Article 25.(Exhibit A), it was provided:

"(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

Fourteenth. On May 12, 1933, effective May 16, 1933, the Milk Control Board adopted an order known as Official Order No. 17, a full, true and correct copy of which is annexed hereto and marked "Exhibit B" and made a part hereof. Said order was subsequently amended by Official Order No. 19, Official Order No. 28, Official Order No. 32 (effective July 1, 1933), by Official Order No. 34 (effective July 21, 1933), by Official Order No. 41 (effective September 18, 1933), and by Official Order No. 43 (effective October 16, 1933). Official Order No. 17 (Exhibit B) established minimum prices to be paid by milk dealers to producers for milk in accordance with the "classified price plan," which price plan was and is based upon the ultimate utilization by the dealers of the milk so purchased. The subsequent official orders herein recited made certain amendments to or changes in the [fol. 7] prices to be paid by the milk dealer to the producer, but did not materially change the general price structure set up by said Official Order No. 17 (Exhibit B).

Fifteenth. On or about June 30, 1933, the Milk Control Board adopted an order known as Official Order No. 33, effective July 1, 1933, a full, true and correct copy of which

is annexed hereto, marked "Exhibit C" and made a part hereof. Under and by virtue of the said Official Order No. 33 the purchase or sale by or to a milk dealer of fluid milk (followed by the utilization of the same within New York State) at a price less than the sum of the minimum price established by the Milk Control Board to be paid to producers for such milk, irrespective of where such producers might be located, was forbidden.

Sixteenth. On or about the 30th day of March, 1934, the Governor of the State of New York approved Chapter 126 of the Laws of 1934 enacted by the Legislature of said State, which said Chapter amended the said Agriculture and Markets Law by repealing Article 21 thereof. A full, true and correct copy of said Chapter 126 of the Laws of 1934 is annexed hereto and marked "Exhibit D" and made a part hereof. Said Article 25 (Exhibit A) expired on March 31, 1934, by its own limitations.

Seventeenth. It is provided in and by the said Article 21 and Article 21-A (Exhibit D) that the functions, powers and duties of the Milk Control Board created by the said Article 25 (Exhibit A), except as modified in and by the said Article 21 and Article 21-A (Exhibit D), shall be exercised and performed by a division in the Department [fol. 8] of Agriculture and Markets to be known as the Division of Milk Control. It is further provided that the Department of Agriculture and Markets shall be vested with the powers theretofore conferred upon the Milk Control Board by the said Article 25 (Exhibit A), and that the said Commissioner may adopt and enforce all rules and all orders necessary to carry out the provisions of the said Article 21 and Article 21-A (Exhibit D).

Eighteenth. In and by Section 258-i of said Article 21 (Exhibit D), it is provided that the rules and orders of the Milk Control Board in effect at the time of the transfer to the Division of Milk Control of the powers, duties and functions theretofore vested in the Milk Control Board or the Commissioner of Agriculture and Markets shall remain in full force and effect until otherwise provided by the said Commissioner.

Nineteenth. The said Official Order No. 17 (Exhibit B) and said Official Orders amendatory thereof, as hereinabove

set forth, and Official Order No. 33 (Exhibit C) are deemed by the defendants to be in full force and effect.

Twentieth. In and by subsection 4 of Section 258-m of said Article 21-A (Exhibit D) it was provided:

"4. It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any [fol. 9] such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

This subsection is a reenactment of subdivision "g" of Section 312 of Article 25 (paragraph Thirteen of Bill of Complaint).

Twenty-first. The plaintiff has continually for many years purchased milk from the Fair Haven, Vermont, Milk Shed, from other creameries located at or near Fair Haven, Vermont, as well as from Seelig Creamery Corporation, as aforesaid. Plaintiff has never at any time had or used any other milk shed than that located in and about Fair Haven, Vermont, as a source of its milk supply. All milk purchased by plaintiff from any of the creameries at Fair Haven, Vermont, is purchased under yearly contracts, running from April 1st to March 31st of each year, between the plaintiff and the respective creameries and all purchases are made F. O. B. Fair Haven, Vermont.

Twenty-second. As to the sale of milk by the plaintiff to consumers within the State of New York, and chiefly within the City of New York, where it finds its market, the plaintiff has at all times followed and complied with the rules and orders of the Milk Control Board governing such sales and the prices charged for its products.

[fol. 10] Twenty-third. In and by Section 257 of the said Article 21 (Exhibit D), it is provided that no milk dealer

(said term being defined in Section 253 of the said Article to include any person who purchases or handles milk, other than a hotel or restaurant which sells only milk consumed on the premises where sold or a producer who delivers milk only to a milk dealer) shall buy or sell or distribute milk unless such dealer be licensed as provided in said Article 21. It is further provided in and by Section 258 of said Article 21 that every milk dealer shall file on or before April 30, 1934, an application for the license so required to be obtained upon a blank prepared under authority of the Commissioner of Agriculture and Markets. It is further provided in and by Section 258-c of said Article 21 that the said Commissioner may refuse to grant a license or may revoke a license already granted when he is satisfied of the existence of any of the reasons set forth in said Section 258-c. It is further provided in and by Section 258-e of said Article 21 that the said Commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of the statutes, rules and orders committed to his administration and in addition to any other remedy under Article 3 of the said Agriculture and Markets Law or otherwise may apply for relief by injunction.

Twenty-fourth. The defendant Charles H. Baldwin, as Commissioner of Agriculture and Markets, requires as a prerequisite to the granting of the licenses required to be obtained by the plaintiff as a milk dealer pursuant to the provisions of Section 258 of the said Article 21 (Exhibit D) that the plaintiff shall agree in writing to comply with and obey the provisions of said Agriculture and Markets Law [fol. 11] and the rules and orders promulgated by the said Commissioner. Unless such an agreement is made by the plaintiff, the Commissioner will not grant such license to it.

Twenty-fifth. In and by Sections 38, 39 and 40 of the said Agriculture and Markets Law (a full, true and correct copy of which Sections is annexed hereto and marked "Exhibit E" and made a part hereof), it is provided that every person, firm, corporation or association who shall, by himself, itself or through his or its agents, officers and employees, violate any of the provisions of said law or of any other law the enforcement of which is within the jurisdiction of the Department of Agriculture and Mar-

kets, or who shall fail to obey any order of the Commissioner of Agriculture and Markets, or who shall violate any rule of the said Department, shall be subject to certain money penalties in the said Sections more particularly set forth, and that in an action for the recovery of any such penalty or forfeiture for the violation of such law or of such rule an application may be made on the part of the people for an injunction to restrain the defendant, his agents, and employees, from the further violation thereof.

Twenty-sixth. In and by Section 41 of the said Agriculture and Markets Law (a full, true and correct copy of which Section is hereto annexed, marked "Exhibit F" and made a part hereof), it is provided that the violation of any of the provisions of the said Agriculture and Markets Law constitutes a misdemeanor, punishable by fine or imprisonment or both.

Twenty-seventh. Under and by virtue of said Article 21 [fol. 12] and Article 21-A (Exhibit D), the defendant Charles H. Baldwin, as Commissioner of Agriculture and Markets, and the defendant Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, are charged with the duty of enforcing the provisions of the said Article 21 and Article 21-A and the said Official Orders and the amendments thereof, as hereinbefore set forth.

The said defendants, in their said official capacities, have, after application duly made therefor by the plaintiff, rejected said plaintiff's application for a license and have refused to issue to the plaintiff the license which plaintiff is required to obtain pursuant to said Article 21, on the ground that the plaintiff has failed to agree in writing to comply with and obey the provisions of said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner and in particular because of plaintiff's refusal to agree not to sell within the State of New York, after it has come to rest within said State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State under similar conditions, and the said defendants, in their said official capacities, have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets

Law if the plaintiff shall continue its business as a milk dealer on or after May 1, 1934, without having first obtained the required license.

Twenty-eighth. Under and by virtue of the said Agriculture and Markets Law, the defendant John J. Bennett, Jr., as Attorney General of the State of New York, is charged with the duty of causing an action or proceeding to be brought in the name of the People of the State of [fol. 13] New York for the recovery of any penalty or forfeiture incurred under the provisions of Sections 39 and 40 of said Law (Exhibit E).

The said defendant, in his said official capacity, may institute criminal proceedings against the plaintiff if the plaintiff shall, without first having obtained the required license, continue its business as a milk dealer on or after May 1, 1934, and may also institute criminal proceedings against the plaintiff if it shall sell or attempt to sell, within New York State, milk or cream purchased from producers without the State, at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions.

Twenty-ninth. Under and by virtue of the said Agriculture and Markets Law and other applicable statutes of the State of New York, the defendant William C. Dodge, as District Attorney of the County of New York, is charged with the duty of prosecuting any person or corporation guilty of a violation of Section 41 of said Agriculture and Markets Law (Exhibit F).

The said defendant, in his said official capacity, may institute criminal proceedings against the plaintiff if the plaintiff shall, without first having obtained the required license, continue its business as a milk dealer on or after May 1, 1934, and may also institute criminal proceedings against the plaintiff if it shall sell or attempt to sell, within New York State, milk or cream purchased from producers without the State, at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions.

Thirtieth. The penalties attached to a violation of the [fol. 14] provisions of said Article 21 and Article 21-A (Exhibit D) and the Official Orders adopted thereunder by the Commissioner of Agriculture and Markets are so great

that the plaintiff may not sell within New York State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk and — produced within the State, purchased under similar conditions, even for the purpose of testing the constitutionality and validity of said Articles and said Official Orders, and unless this Court shall determine the validity of the said Articles and said Official Orders in this proceeding, the plaintiff, its officers, agents and employees will be compelled to submit to said Articles and said Official Orders, whether the same be valid or invalid, and the plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws in violation of the provisions of the Constitution of the United States.

A. In that Article 21 and Article 21-A, as interpreted in their administration by the defendants, is an attempt to interfere with and prohibit the plaintiff from importing milk into New York State from a foreign State, and contravene the provisions of the United States Constitution, Article I, Section 8, providing that Congress shall have the sole power to regulate commerce among the several states, and are void and unconstitutional.

B. In that Article 21 and Article 21-A, as interpreted and administered by the defendants, in requiring plaintiff to purchase milk only at a price fixed by defendants, when such purchases are made outside the State of New York, contravene the provisions of the United States Constitu- [fol. 15] tion, Article I, Section 8, providing that Congress shall have the sole power to levy imposts and duties upon products coming in from another State, and are void and unconstitutional.

C. In that Article 21 and Article 21-A are void and unconstitutional for the reason that said Articles are arbitrary interference with the freedom of contract and an attempt to render invalid the present and existing contracts for the purchase and sale of milk and cream, heretofore made by and between the plaintiff and the creameries located in and about Fair Haven, Vermont, and contravene the provisions of the Fourteenth Amendment to the United States Constitution providing that no person shall be deprived of property without due process of law.

D. In that all transactions between the plaintiff and the creameries from which it purchases its milk and cream, located in and about Fair Haven, Vermont, are conducted and consummated in the State of Vermont and constitute interstate commerce and are not subject to the jurisdiction, direction or control of the Division of Milk Control represented by the defendants herein.

Thirty-first. By reason of the said Articles and the said Official Orders, the plaintiff's entire business as a milk dealer is and will continue to be threatened with total extinction, with resultant loss and damage, for which it has and can have no recourse.

Thirty-second. The plaintiff has no adequate remedy at law and is relievable only in a court of equity.

[fol. 16] Wherefore, and inasmuch as the plaintiff can have adequate relief only in a court of equity, the plaintiff prays:

1. That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets, and Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, John J. Bennett, Jr., as Attorney General, and William C. Dodge, as District Attorney of the County of New York, and each of them, from bringing or prosecuting, or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, any action, suit or proceeding at law or in equity or any criminal action or proceeding:

(a) Against the plaintiff, or any of the officers, agents or employees thereof, by reason of the plaintiff selling or attempting to sell, within the State of New York, milk or cream purchased from producers without the State of New York, at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions;

(b) Against any other person, firm, corporation or association, or any of the officers, agents or employees thereof, or from revoking any license required by Article 21 of said Agriculture and Markets Law to be obtained and held by

any such person, firm, corporation or association, by reason of such person, firm, corporation or association purchasing from or selling to the plaintiff milk or cream purchased [fol. 17] from producers without the State of New York at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions;

(c) Against the plaintiff or any officer, agent or employee thereof, by reason of the plaintiff continuing on or after May 1, 1934, its business as a milk dealer without having first obtained the license required by Article 21 of said Agriculture and Markets Law, or against any other person, firm, corporation or association, or any officer, agent or employee thereof, or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association purchasing from or selling to the plaintiff milk or cream purchased from producers without the State of New York at a price lower than that required to be paid producers within the State purchased under similar conditions, or in any way dealing in or handling milk of the plaintiff, although the plaintiff shall not have obtained the license required by Article 21 of said Agriculture and Markets Law, provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the license provided for by Article 21 of the Agriculture and Markets Law other than (1) by having refused to agree in writing, on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or before said date not to sell within the State of New York milk or cream purchased from producers without the State at a price lower than that required to be paid pro- [fol. 18] ducers for milk or cream produced within the State purchased under similar conditions, or (2) by the sale to or the purchase from said plaintiff by any person, firm, corporation or association of any such milk purchased by plaintiff from producers without the State of New York at a price lower than that required to be paid producers for milk or cream produced within the state purchased under similar conditions.

2. That the said Article 21 and Article 21-A and the said Official Orders, insofar as the said Articles and Official Orders (1) prohibit or restrain the plaintiff from purchasing or selling milk or cream within New York State purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions and (2) prohibit or restrain any person, firm, corporation or association from selling to or purchasing from the plaintiff milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions, be declared to be unconstitutional, illegal and void, in that they violate the provisions of Article I, Section 8, and of the Fourteenth Amendment to the Constitution of the United States, by attempting to regulate commerce between the several States, by attempting to levy imposts and duties upon products coming from another State and by depriving plaintiff of its property without due process of law and by depriving plaintiff of the equal protection of the laws, and that an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the enforcement of said Articles and Official Orders as hereinabove prayed for.

3. That the plaintiff may have such other and further [fol. 19] relief in the premises as the nature of the case may require and as may be in accordance with equity.

4. That a writ or writs of subpoena be directed to the said defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, commanding them, and each of them, at a certain time and under a certain penalty therein to be named, to be and appear before this Honorable Court then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to

abide by and perform such other and further orders or decrees as to the Court shall seem meet.

John J. O'Connor, 2 Lafayette Street, New York, N. Y., Solicitor for Plaintiff.

[fol. 20] *Duly sworn to by Walter J. Seelig. Jurat omitted in printing.*

[fol. 21-43] EXHIBIT A to BILL of COMPLAINT

Laws of New York.—By Authority

CHAPTER 158

An Act to amend the agriculture and markets law, in relation to milk control during the existing emergency, creating the milk control board and defining its jurisdiction, powers and duties

Became a law April 10, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

[Text of law omitted in printing]

[fol. 44] EXHIBIT B TO BILL OF COMPLAINT

State of New York

Department of Agriculture and Markets

Milk Control Board

Official Order No. 17

As Amended and Supplemented by Official Order No. 19

In the Matter of Fixing Minimum Prices to be Paid by Milk Dealers to Producers and Others for Milk

Such investigations and proofs as the emergency permits having been made, and public hearing having been had after reasonable notice to the public generally through

newspapers and otherwise, and due deliberation having been had, it is hereby ordered:

1. For the purposes of this order milk is classified as to its uses, into nine classes, as follows:

(a) Class 1 milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization by human consumption as raw or pasteurized milk. It includes all milk leaving a milk plant or receiving station in fluid form, in the absence of clear proof that such milk is so utilized as to fall into some other class. It also includes all milk utilized in any manner not included within the classes defined hereinafter.

"In the case of a dealer who receives or handles not more than fifteen hundred forty-quart cans of milk (or its equivalent) per month, any part of which is Class 1 [fol. 45] milk, at least seventy-five per cent of all milk (or its equivalent) received or handled by him shall be included in Class 1, and remainder in Class 2-A."

(b) Class 2-A milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization as fluid cream. It includes all milk made into sweet or sour cream and leaving a milk plant or receiving station in such form, in the absence of clear proof that such milk is so utilized as to fall into some other class.

"(c) Class 2-B milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization as plain condensed milk and in certain forms of cheese. It includes milk made into plain condensed milk, all milk used in the manufacture of cheeses of the soft type, such as Neufchatel, Pimento, Pimento Olive, D'Isigny, Port DeSalut, Lunch, Kosher, Petit Suisse, etc., and any other cheese except those specified by name in Classes 3 and 4-B."

"(d) Class 2-C includes all milk used in the manufacture of ice cream in New York City and milk from which is de-

rived fresh or storage cream and unsweetened condensed milk, used in the manufacture of ice cream in New York City. It also includes milk from which is derived storage cream used in the manufacture of sour cream."

"(d-1) Class 2-D includes all milk used in the manufacture of ice cream outside of New York City and milk from [fol. 46] which is derived cream and unsweetened condensed milk used in the manufacture of ice cream outside of New York City.

"(d-2) Class 2-E includes all milk from which is derived storage cream used in the manufacture of cream cheese."

"(e) Class 3 milk includes milk which is used in the manufacture or sterilized and evaporated whole milk, sweetened whole condensed milk, milk chocolate, whole milk powder, powdered malted milk; also all milk to which milk fat is added that is used in the manufacture of milk powder; also all milk that is used in the manufacture of Cream, Swiss, Limburger, Munster, Pineapple, Edam, Gouda, De Brie, Camembert, Hard Italian, Brick, Farmers Pressed Cheese and other cheeses of similar type."

(f) Class 4-A milk shall include all milk that is made into butter.

(g) Class 4-B milk shall include all milk that is made into American Cheese.

2. It shall be presumed, in the absence of clear proof to the contrary, that any milk purchased or received or handled by a milk dealer, except at a plant or receiving station engaged continuously and solely in manufacturing the milk, leaves such plant or receiving station in fluid form.

3. It shall likewise be presumed, in the absence of clear proof to the contrary, as to any milk dealer buying milk within the State of New York, and also buying elsewhere, [fol. 47] that all milk marketed or utilized within the State in Class 1 is milk purchased within the State to the full amount available therefore, and likewise as to each successive lower class.

4. The prices hereinafter established shall not apply to milk sold to the state or any municipality or to the federal

government upon bids, but any milk dealer claiming exemption under such provisions shall make written and verified application for such exemption, in form satisfactory to the Board, if possible before purchasing or receiving or handling the milk as to which exemption is claimed.

5. The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 1 milk. Such base price shall be based upon delivery of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-210 miles distant from New York City. No off rail differential shall be allowed except as specially authorized by the Board. Such base price shall be subject to certain differentials, as follows, all or any of which may apply to a specific transaction:

(a) Freight differential. The actual price for Class 1 milk marketed for consumption in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk is ascertained by adding to the base price at the 201-210 mile freight zone 53c per 100 pounds, and deducting from the result thereby obtained the actual freight rate applying per 100 pounds of milk from there to New York City, but there shall not be deducted an amount in excess of 69c per [fol. 48] 100 pounds. A schedule hereto annexed indicates the freight differential which is to be applicable until further notice. There shall be no freight differential for Class 1 milk marketed for consumption elsewhere in the State than in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk. Milk received or handled at a milk plant or receiving station less than 200 miles from New York City shall be presumed to be marketed for consumption in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk in the absence of clear proof to the contrary.

(b) Milk fat differential. The actual price is ascertained by adding to the base price in the case of milk testing more than 3.5%, or subtracting from the base price, in the case of milk testing less than 3.5%, four cents per 1/10th of 1% of milk fat.

(c) Grade A differentials. Milk which is qualified under the New York City Department of Health requirements for sale as Grade A, and which is delivered to plant sim-

ilarly qualified, shall have added to the base price the following differentials:

Butterfat	10,000 or less bacteria colonies per c. c.	10,001 to 25,000 bacteria colonies per c. c.
3.0	.05	.025
3.1	.075	.05
3.2	.10	.05
3.3	.15	.075
3.4	.20	.10
3.5	.25	.15
3.6	.30	.20
3.7	.35	.25

[fol. 49] No increased differential for additional points of butterfat above 3.7%. Existing arrangements between any cooperative association and milk dealers buying through it from its producer members, affecting Grade A, differentials, may be continued.

6. The base price established by this order for Class 1 milk is $1.88.

7. The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 2-A milk. Such base price shall be based upon the delivery of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price shall be subject to certain differentials, as follows, all or any of which may apply to a specific transaction.

(a) Freight differential. The base price shall apply to all points 201-225 miles, both inclusive, from New York City, with 1c per 100 pounds of milk added for every 25 mile zone under 201 miles, and 1c per 100 pounds of milk deducted for every 25 mile zone over 225 miles.

(b) Milk fat differential. The same differential provided for Class 1 milk shall apply to Class 2-A milk also.

(c) Grade A differential. The same differential provided for Class 1 milk shall apply to Class 2-A milk also.

8. The base price established by this order for Class 2-A milk is $1.30.

[fol. 50] 9. The Board will establish by this order, and may from time to time change by other orders or by amend-

ing orders, a base price for Class 2-B milk. Such base price shall be based upon delivery of one hundred pounds of milk containing 3.5% of milk fat to milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price shall be subject to the same differentials provided for Class 2-A milk.

10. The base price established by this order for Class 2-B milk is $1.50.

11. "The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 2-C milk, a base price for Class 2-D milk, and a base price for Class 2-E milk. Such price in in each case shall be based upon deliveries of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price in each case shall be subject to the same differentials provided for Class 2-A milk."

12. "The base price established by this order for Class 2-C milk is $1.20.

"The base price established by this order for Class 2-D shall be not less than 10 cents more than the price determined for Class 4-A.

"The base price established by this order for Class 2-E shall not be less than 19 cents more than the price determined for Class 4-A."

13. The price for Class 3 milk shall be the average paid at midwest condenseries, as determined by the Board at the [fol. 51] end of each month, plus not less than 10c per hundred pounds of milk, the milk fat differential to be figured upon a direct ratio between milk fat content and price. The prices above fixed apply to all points 201-250 miles, both inclusive, from New York City, with 1c per 100 pounds of milk added for every 50 mile zone under 201 miles, and 1c per 100 pounds of milk deducted for every 50 mile zone over 250 miles.

14. The price for Class 4-A milk shall be determined for the month during which the milk is handled, by taking the official New York average outside quotations for 92 score butter, deduct four cents a pound for making, and figure an overrun of 16%.

15. "The price for Class 4-B milk shall be determined for the month during which the milk is handled, by taking the official New York City average price for New York State average run colored and uncolored flats, or the average price for fresh Wisconsin single daisy cheese in New York City as quoted by the U. S. Department of Agriculture, whichever is higher, less three cents per pound of cheese allowance for making, and compute according to the yield of cheese per 100 pounds of milk as follows:

B. F. Test	Cheese Yield	B. F. Test	Cheese Yield
3.0%	8.30	4.3%	11.29
3.1%	8.53	4.4%	11.52
3.2%	8.76	4.5%	11.75
3.3%	8.99	4.6%	11.98
3.4%	9.22	4.7%	12.21
3.5%	9.45	4.8%	12.44
3.6%	9.68	4.9%	12.67
3.7%	9.91	5.0%	12.90
3.8%	10.14	5.1%	13.13
3.9%	10.37	5.2%	13.36
4.0%	10.60	5.3%	13.59
4.1%	10.83	5.4%	13.82
4.2%	11.06	5.5%	14.05

[fol. 52] 16. The prices hereby established shall be the minimum prices to be paid by milk dealers to producers and their representatives for milk of the respective classes mentioned; provided, that the prices hereby established shall not apply to purchases by a milk dealer who does not purchase or handle any Class 1 or Class 2 milk. From and after the effective date of this order, and until the Board orders otherwise, no milk dealer shall purchase or receive or handle milk unless payment is made to the producer, or to a co-operative corporation organized or operated under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, for the benefit of its producers, at a rate not less than the rates hereby established. Such payment shall be made in cash or by check not more than forty-six days after delivery of the milk from the producer or on his behalf. Such payment shall be based upon the aggregate of milk received at the plant or receiving station from all producers during the period

covered by the payment, except that the Board may, by special permit to specific milk dealers, authorize them to base payment upon the aggregate of milk received at several plants or receiving stations which are operated together for marketing purposes, or make other special provision. Where some milk included in the payment is of two or more different classes the payment shall be at a rate which will truly represent the proportions of each.

17. No milk dealer shall buy or offer to buy milk at any price less than the price hereby established applicable to such transaction and no method or advice shall be employed whereby milk is bought or offered to be bought at any lesser [fol. 53] price, whether by any discount, or rebate, or excessive charge of hauling or other service, or any other method or device whatsoever. Any method or device which is employed in an effort to defeat the intent of this order as well as any direct violation of it, will be deemed sufficient cause to suspend or revoke the license of the offending milk dealer without further or specific warning.

18. Not later than the 8th day of each month, except as the Board may otherwise provide in special cases, every milk dealer shall file with the Board a report covering individually each milk plant or receiving station operated by him, except as the Board may otherwise provide in special cases, giving in detail covering the preceding month the following information:

(a) Name of dealer and location of plant.

(b) Total amount of milk received from all sources.

(c) The average price per hundred pounds of 3.5 milk delivered at the plant, computed according to the prices established by this order and any amendment thereof.

(d) Whether payment is made by the dealer directly to producers, or to a co-operative associations, and upon what date or dates payment will be made.

(e) Number of producers.

(f) Total amount of milk utilized under each of the various classes and the price for each such class.

Such report shall be in a form to be prescribed by the Board and shall be sworn to by the milk dealer, or by a [fol. 54] responsible and well informed officer or employee

acting for him. The milk dealer shall keep available at his office, if a regular office is maintained separate from the milk plant or receiving station, and otherwise at such plant or station, for at least one year after filing such reports, the books of account and other records upon which it is based, which shall be in form readily to substantiate and afford a check upon the information contained in the reports. Such records shall include the full name and post office address of each individual producer from whom the dealer has received milk, together with his serial number, the number of pounds of milk received from each individual producer, and the milk fat tests as determined by the dealer. Such records shall also include records of every shipment and sale of any milk or milk product from the milk plant or receiving station.

19. This order shall take effect at 1 A. M. Eastern Standard Time on Tuesday, May 16, 1933.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

Dated, Albany, N. Y., May 12, 1933.

[fol. 55] Zone Prices and Freight Differential Official Order No. 17

Miles	Freight Rate 40 Quart Can Class 1 Milk	Freight Allowance per 100 Class 1 Milk	Miles	Freight Rate 40 Quart Can Class 1 Milk	Freight Allowance per 100 Class 1 Milk
10 or under	$.235	$.275	201–210	$.455	$.530
11–20	.245	.285	211–220	.470	.545
21–25	.265	.310	221–225	.475	.550
26–30	.265	.310	226–230	.475	.550
31–40	.275	.320	231–240	.480	.560
41–50	.295	.345	241–250	.485	.565
51–60	.305	.355	251–260	.500	.580
61–70	.320	.370	261–270	.505	.585
71–75	.330	.385	271–275	.510	.595
76–80	.330	.385	276–280	.510	.595
81–90	.340	.395	281–290	.515	.600
91–100	.355	.415	291–300	.530	.615
101–110	.360	.420	301–310	.535	.620
111–120	.370	.430	311–320	.540	.630
121–125	.385	.450	321–325	.545	.635
126–130	.385	.450	326–330	.545	.635
131–140	.395	.460	331–340	.560	.650
141–150	.400	.465	341–350	.565	.655
151–160	.415	.485	351–360	.570	.665
161–170	.420	.490	361–370	.575	.670
171–175	.430	.500	371–375	.580	.675
176–180	.430	.500	376–380	.580	.675
181–190	.440	.510	381–390	.590	.685
191–200	.450	.525	391–400	.595	.690

[fol. 56] EXHIBIT C TO BILL OF COMPLAINT

State of New York

Department of Agriculture and Markets

Milk Control Board

Official Order No. 33

In the Matter of the Fixing of Intermediate Prices

Such investigations and proofs as the emergency permits having been made, and public hearings having been had after notice which in the judgment of the Board is sufficient, and due deliberation having been had, it is hereby ordered, that

Any continuous and regular purchase or sale or delivery or receipt of milk passing to a milk dealer at any place and available for utilization as fluid milk and/or cream within New York State, followed by such utilization in one or more instances, where the price involved in such purchase or sale or delivery or receipt is less than the sum of the minimum price established to be paid to producers for such milk plus actual costs of transporting and handling and processing such milk to the place and to the condition involved in such purchase or sale or delivery or receipt, hereby is forbidden.

This order shall take effect on Saturday, July 1, 1933.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

Dated: Albany, N. Y., June 30, 1933.

[fols. 57-86] EXHIBIT D TO BILL OF COMPLAINT

Laws of New York.—By Authority

Chapter 126

An Act to amend the agriculture and markets law, in relation to creating a division of milk control, defining its jurisdiction, powers and duties, and continuing certain special powers and duties during the existing emergency, and making an appropriation therefor

Became a law March 30, 1934, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

[Text of law omitted in printing]

[fol. 87] EXHIBIT E TO BILL OF COMPLAINT

Sec. 39. Penalties for violation of chapter or other laws. Every person violating any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department shall, except where other penalties are hereinafter prescribed, be subject to a penalty in the sum of not less than twenty-five dollars nor more than one hundred dollars for the first violation, nor more than two hundred dollars for the second and each subsequent violation; provided, however, that for a violation by a retail merchant of section two hundred and twelve of this chapter, or of article thirteen-a of this chapter, the minimum penalty shall be ten dollars. When such violation consists of the manufacture or production of any prohibited article, each day during which or any part of which such manufacture or production is carried on or continued, shall be deemed a separate violation. When the violation consists of the sale, or the offering or exposing for sale or exchange of any prohibited article or substance, the sale of each one of several packages shall constitute a separate violation, and each day on which any such article or substance is offered or exposed for sale or exchange shall constitute a separate violation. If the sale be of milk

and it be in cans, bottles or containers of any kind and if the milk in any one of such containers be adulterated, it shall be deemed a violation whether such vendor be selling all the milk in all of his containers to one person or not. When the use of any such article or substance is prohibited, each day during which or any part of which such article or substance is so used or furnished for use, shall constitute a separate violation, and the furnishing of the same for use to each person to whom the same may be furnished shall [fol. 88] constitute a separate violation. When the storage of any article is prohibited beyond a certain period, each day during which or any part of which any article is so stored beyond the period provided for by this chapter, shall constitute a separate violation.

A right of action for the recovery of, or a liability for, penalties incurred as provided in this chapter, or in any other law the enforcement of which is within the jurisdiction of the department, may be released, settled or compromised before the matter is referred to the attorney-general as provided in section forty-four of this chapter, and thereafter may be released, settled or compromised by the attorney-general, either before or after an action is brought to recover such penalties.

Sec. 40. Penalty for violation of rule or order. Every person, association or corporation and all agents, officers and employees thereof, shall obey every order made as provided in this chapter, so long as such order shall be in force. A person, association or corporation who shall fail by himself, itself or through his or its agents, officers and employees, to obey any order of the commissioner, or who shall violate any rule of the department, shall be subject to a penalty not exceeding the sum of two hundred dollars for each and every offense. Every violation of such order, or of the rules of the department, shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

[fols. 89 & 90] EXHIBIT F TO BILL OF COMPLAINT

Sec. 41. Violation of chapter a misdemeanor. Except as otherwise provided by the penal law, a person who by him-

self or another violates any of the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, is guilty of a misdemeanor, and upon conviction shall, except as otherwise provided in this chapter, be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment for not less than one month, nor more than six months, or by both such fine and imprisonment, for the first offense; and by not more than one year's imprisonment for the second offense.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. DANIEL DOUGHERTY

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

J. Daniel Dougherty, being duly sworn, deposes and says:

I am an attorney and counsellor-at-law, associated with John J. O'Connor, solicitor for the plaintiff herein, and am familiar with the matters hereinafter stated.

On or about November 13, 1933, there were served upon the plaintiff above named the summons and complaint, together with motion papers for a temporary injunction against the plaintiff in his action, wherein the predecessors in office of the above named defendants, other than the District Attorney of the County of New York and the Attorney General of the State of New York, were plaintiffs, arising out of the Supreme Court of the State of New York, Albany County. The motion for an injunction in said pro-
[fol. 92] ceeding in the New York State Supreme Court was withdrawn, but subsequently a notice of trial was served by the Milk Control Board, the plaintiffs in said action, and when the matter reached the Trial Calendar in January, 1934, it was referred to the Honorable Frank H. Hiscock as Referee. No further steps have been taken in said New York State Supreme Court action.

With the enactment of Articles 21 and 21-A of the Agriculture and Markets Law and the rejection of the plaintiff's application for a license, the Milk Control Board, as plaintiff in said New York State action, have, in effect at least, received all the relief or judgment they were seeking against the plaintiff in this New York State Court action, possible. In other words, a continuation of the New York State action would, in the mind of deponent, be wholly and solely academic and could not conceivably result in any benefit to any of the parties thereto. This observation is concurred in by Mr. Henry S. Manley, counsel for the defendants comprising the Division of Milk Control in this action as set forth in Mr. Manley's letter, marked "Exhibit 2", and attached to the affidavit of Walter J. Seelig, verified the 28th day of May, 1934.

The business methods of the plaintiff herein in selling its milk within New York City involve many separate transactions daily with its individual consumers and so long as the plaintiff shall not obtain a license each such transaction renders the plaintiff and its officers, agents and employees liable to a penalty of $200 and to fines in an equal amount and also renders plaintiff's officers, agents and employees liable to imprisonment and may, as outlined in Mr. Manley's letter herein referred to as "Exhibit 2," attached to Mr. Seelig's affidavit, impair the standing of other milk dealers who may in the course of conducting their respec- [fol. 93] tive businesses deal with the plaintiff herein.

If the plaintiff were to attempt to challenge the validity of the statute and orders complained of by a single violation thereof, it would be forced to suspend its business until there could be a determination of such issue. The plaintiff herein therefore has no adequate remedy other than to proceed by application for an injunction. Such remedy is not open to it in the State courts since under the law of New York a court of that state may not enjoin the enforcement of a criminal statute.

J. Daniel Dougherty.

Sworn to before me this 28th day of May, 1934.
Lucy Schaefer, Notary Public, Queens County.
Queens Co. Clk's No. 1602, Reg. No. 5629. Kings Co. Clk's No. 37, Reg. No. 5194. N. Y. Co. Clk's No. 613, Reg. No. 5S353. Commission expires March 30, 1935.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WALTER J. SEELIG

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

Walter J. Seelig, being duly sworn, deposes and says:

1. I am the Treasurer of G. A. F. Seelig, Inc., the plaintiff in the above entitled action, and am authorized to make this affidavit in support of the plaintiff's application for a temporary restraining order and for an interlocutory injunction.

2. I have read the Bill of Complaint in the above entitled cause and know the contents thereof and beg leave to incorporate in this affidavit each and every allegation therein contained, with the same force and effect as if set forth herein at length.

[fol. 95] 3. The plaintiff is a corporation, duly organized and existing under the laws of the State of New York and having its principal office at No. 522 West 29th Street, Borough of Manhattan, City, County and State of New York.

4. The business of the plaintiff consists, among other things, of purchasing, handling and selling fluid milk and cream in and about the State of Vermont and the City of New York. The plaintiff owns and operates a plant for the distribution and sale of milk in the City of New York at the address given above. The plaintiff, in handling approximately 20,000 pounds of milk daily, may be said to be, in comparison with others engaged in the same business in New York, one of the smaller milk dealers. The plaintiff's corporate ownership and control, however, represents a third generation of milkmen engaged in this business and its commercial reputation and financial standing have been without blemish over a very long period of time.

5. The plaintiff, as a milk distributor or dealer, purchases under contract—which contracts are renewed yearly and run from April first of one year to April first of the

next year—the whole output of processed milk of the Seelig Creamery Corporation, located at Fair Haven, State of Vermont. The plaintiff likewise, under similar annual contracts, purchases part of its supply of milk from other creameries located at Fair Haven, Vermont. All milk handled by the plaintiff is purchased from creameries located in Fair Haven, Vermont, and is all purchased f. o. b., Fair Haven, Vermont, and title thereto passes to it at that point. The present existing contracts between plaintiff and the creameries, from which it gets its supply, do not expire [fol. 96] until March 31st, 1935. The plaintiff has continually for many years purchased milk from the Fair Haven, Vermont, milk shed, making such purchases from creameries established at Fair Haven for many years. Fair Haven, Vermont, which is a well-known Milk Shed, with a particularly high quality of milk, has always served as plaintiff's source of supply, with New York City its market for the disposal of its milk and cream. It cannot properly be contended, in view of this long-continued method of doing business, that the plaintiff went outside of the boundaries of New York State to seek an alleged cheaper market for the purchase of its milk supply, since the enactment of Articles 21 and 21-A and 25 of the Agriculture and Markets Law of the State of New York.

6. Seelig Creamery Corporation, hereinabove mentioned, is a corporation organized under the laws of the State of New York, but does no business whatsoever within the boundaries of New York State, all of its operations being conducted in the State of Vermont. It owns and operates a creamery for the processing of milk at Fair Haven, Vermont. Said Seelig Creamery Corporation is not itself a producer of milk, but buys from the farmers of that section all the milk offered to it. After pasteurizing or otherwise processing such milk, the same is loaded on railroad cars, f. o. b. Fair Haven, for shipment to the plaintiff. Title to the milk passes to the plaintiff at Fair Haven, Vermont, upon loading in railroad cars at that point. The same situation exists as to the other creameries located at Fair Haven, from whom the plaintiff buys a small part of its supply of milk.

7. The plaintiff is wholly and solely a milk dealer within the customary and well-understood meaning of that term

in the milk business. It has no contact whatsoever with the [fol. 97] farmer or the producers of the milk and in marketing its milk within the City of New York sells chiefly in what is known as "can lots," as distinguished from sales of bottled milk. It finds its customers for the sale of its milk in New York City among the hotels, restaurants, hospitals and similar institutions.

8. The provisions of sub-section 4 of Section 258-m of the Agriculture and Markets Law, quoted in paragraph 20 of the Bill of Complaint herein, are arbitrary, unreasonable, oppressive and discriminatory and have no relation to the protection of public health or public welfare and the plaintiff has been informed by his counsel, John J. O'Connor, and verily believes, that the provisions of this section are unconstitutional, illegal and void and are in violation of Section 8 of Article 1 and of the Fourteenth Amendment to the Constitution of the United States, in that they deprive the plaintiff of its property without due process of law and attempt to regulate commerce between the States and are an arbitrary interference with the freedom of contract.

9. On or about April 24, 1934, the plaintiff received from the Commissioner of Agriculture and Markets the application blank required by him to be filed in his office as a prerequisite to the issuance of the necessary license to the plaintiff so that the plaintiff might carry on its business as a milk dealer. On advice of its counsel, the plaintiff prepared and submitted to the said Commissioner its application for a license, together with the requisite fee in payment for the same. On or about May 8, 1934, the defendants Charles H. Baldwin and Kenneth F. Fee, through their associate counsel, Robert G. Blabey, Esq., delivered to the said counsel for the plaintiff a letter, a copy of which is hereto annexed and marked "Exhibit 1" and made a part [fol. 98] hereof. The reason for the rejection of plaintiff's application for a license was, as stated in Mr. Blabey's letter, its qualified answer to question number 37 on the said application form. Question number 37 reads as follows:

"Do you agree not to sell within New York State, after it has come to rest within the State, milk or cream purchased from producers without the State, at a price lower than that required to be paid producers for milk or cream

produced within the State, purchased under similar conditions?"

The plaintiff answer this question:

"Yes, if and when it shall be determined by the courts that the Commissioner has power and authority to compel such payment to producers outside the State of New York."

There were two reasons for making this so-called "qualified" answer to question number 37 of the license application, the first being that there is now pending in the Supreme Court of the State of New York, Albany County, an action between the plaintiff herein and some of the defendants who at that time constituted what was known as the "Milk Control Board," and second, because of plaintiff's contention that the section of the Agriculture and Markets Law upon which said question number 37 is apparently based is invalid and unconstitutional. The matter of the New York Court action is set forth in full in the affidavit of plaintiff's counsel, submitted herewith.

10. With the rejection of plaintiff's application for a milk dealer's license, plaintiff was faced with two possible alternatives: (1) that it could violate the provisions of the statute and orders made thereunder regarding the pur- [fol. 99] chase of milk in Vermont, or (2) that it could attempt to continue to operate as a milk dealer in the City of New York without a license as required by the statute of New York. Each of these alternatives presents to the plaintiff the certain prospect of immediate and irreparable loss, damage and injury, and subjects it to prosecution under the penal features of the Agriculture and Markets Law.

11. This left the plaintiff with apparently only one course of action, namely, to commence an action to determine the constitutionality and validity of the provisions of the statute and orders made thereunder regarding the price to be paid to producers for milk imported from Vermont. This course of action is suggested in a letter addressed to counsel for the plaintiff by Henry S. Manley, Esq., counsel for those defendants herein comprising the Division of Milk

Control. A copy of said letter is annexed hereto, marked "Exhibit 2" and made a part hereof.

12. The commencement of an action to determine the constitutionality and validity of the provisions of the statute, however, affords no protection to the plaintiff until such issue of validity shall be decided by this court unless a temporary restraining order shall issue out of this court, enjoining and restraining defendants in the manner prayed for in the Bill of Complaint herein. The need and necessity for such a restraining order is brought home very forcibly to the plaintiff by the contents of said letter of Henry S. Manley, Esq., referred to hereinbefore as "Exhibit 2".

Wherefore deponent respectfully prays that, pending the hearing and determination of the application for an interlocutory injunction, the plaintiff have the protection of [fol. 100] a temporary restraining order, and that upon said hearing the interlocutory injunction prayed for in said complaint be granted.

Walter J. Seelig.

Sworn to before me this 28th day of May, 1934. Lucy Schaefer, Notary Public, Queens County. Queens Co. Clk's No. 1602, Reg. No. 5629. Kings Co. Clk's No. 37, Reg. No. 5194. N. Y. Co. Clk's No. 613, Reg. No. 5S353. Commission expires March 30, 1935.

[fol. 101] EXHIBIT 1 TO AFFIDAVIT

State of New York

Department of Agriculture and Markets

Albany

Charles H. Baldwin, Commissioner,
Henry S. Manley, Counsel.

May 8, 1934.

Honorable John J. O'Connor, 2 Lafayette Street, New York, N. Y.

In re G. A. F. Seelig, Inc.

Attention of J. D. Dougherty, Esq.

DEAR SIR:

This Department is today in receipt of the application of your client, G. A. F. Seelig, Inc., for a milk dealer's li-

cense pursuant to the provisions of Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934) for the license year ending March 31, 1935, together with the check of that corporation dated May 5, 1934, payable to the order of the "New York State Milk Control Board" in the sum of $250.00 and drawn on the National City Bank of New York, Chelsea Branch.

Upon an examination of the application, I find that in answer to the question "Do you agree not to sell within New York State after it has come to rest within the state, milk or cream purchased from producers without the state at a price lower than that required to be paid producers for milk or cream produced within the state purchased under similar conditions?" (being question 37 therein), there is attached a typewritten rider which bears the answer: "Yes, [fol. 102] if and when it shall be determined by the courts that the Commissioner has power and authority to compel such payments to producers outside the State of New York."

I am certain you must realize that we appreciate the fact that your client cannot very well carry on its business without a license, particularly in view of the first two sentences of Section 257 of the Law. Having sworn to uphold the Constitution we have no wish to withhold a license for any reason which is not constitutionally valid, and neither have we any desire that your client procure a license by waiver of any constitutional right. Nevertheless if your client is not willing to unqualifiedly agree to bring itself in harmony with the provisions of the Law and the official orders of the Division of Milk Control with respect to question #37 hereinabove mentioned, no license will be granted to it, and we do not see our way clear to relieve it from that embarrassment relative to its application.

I am, therefore, herewith returning to you by registered mail the $250.00 check submitted with the application and I beg to advise you that if your client should continue in the business of buying milk from producers or others or selling or distributing milk without the required license as provided in said Article 21 of the Agriculture and Markets Law, it must assume all the risks involved.

Very truly yours, (Signed) Robert G. Blabey, Assistant Counsel.

RGB:RH.
Encl.

[fol. 103] EXHIBIT 2 to AFFIDAVIT

State of New York

Department of Agriculture and Markets

Albany

Charles H. Baldwin, Commissioner,
Henry S. Manley, Counsel.

May 21, 1934.

Hon. John J. O'Connor, 2 Lafayette Street, New York City, N. Y.

Att. J. D. Dougherty, Esq.

DEAR SIR:

I am informed that G. A. F. Seelig, Inc., has not yet filed an application in proper form under the Milk Control Law, and hence no license has been issued to it. Mr. Blabey's letter of May 8th correctly states our position about this matter and the remedy which is open to your client. If your client wishes to try out the constitutionality of the provisions of the Milk Control Law which forbid the sale in this State of milk purchased from producers in other states at prices less than those established by the Milk Control Board, its appropriate course would seem to be to seek an injunction. This is the method by which Borden's Farm Products Company is now presenting its belief that the "unadvertised differential" provision is unconstitutional. It is a more satisfactory way of presenting our issue than by presenting it on for a hearing before Judge Hiscock, which might involve the issue of constitutional law in questions of fact, and which would certainly take a long time to bring it up through the various appellate courts.

[fols. 104 & 105] Unless your client takes some definite action within the next few days, we must call to the attention of all persons selling to it and all persons buying from it the fact that it is without license, and the fact that under §257 they are jeopardizing their own license by in any way dealing with your client.

Yours very truly, (Signed) Henry S. Manley,
Counsel.

HSM:AR.

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon reading the bill of complaint, verified May 28th, 1934, on file in the above entitled action, and the affidavits of Walter J. Seelig, and J. Daniel Dougherty, both sworn to on May 28th, 1934, and upon the motion of John J. O'Connor, solicitor for the plaintiff, for an order requiring the defendants herein to show cause, if any they have, why they should not be enjoined and restrained during the pendency of this action and until the determination thereof from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, pursuant to any of the provisions of the Agriculture and Markets Law of the State of New York, [fol. 107] any action, suit or proceeding at law or in equity or any criminal action or proceeding:

(a) Against the plaintiff, or any of the officers, agents or employees thereof, by reason of the plaintiff selling or attempting to sell, within the State of New York, milk or cream purchased from producers without the State of New York, at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions;

(b) Against any other person, firm, corporation or association, or any of the officers, agents or employees thereof, or from revoking any license required by Article 21 of said Agriculture and Markets Law to be obtained and held by any such person, firm, corporation or association, by reason of such person, firm, corporation or association purchasing from or selling to the plaintiff milk or cream purchased from producers without the State of New York at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions;

(c) Against the plaintiff or any officer, agent or employee thereof, by reason of the plaintiff continuing on or after May 1, 1934, its business as a milk dealer without having first obtained the license required by Article 21 of said Agri-

culture and Markets Law, or against any other person, firm, corporation or association, or any officer, agent, or employee thereof, or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association, by reason of such person, firm, corporation or association purchasing from or selling to the plaintiff milk or cream purchased from producers without [fol. 108] the State of New York at a price lower than that required to be paid producers within the State purchased under similar conditions, or in any way dealing in or handling milk of the plaintiff, although the plaintiff shall not have obtained the license required by Article 21 of said Agriculture and Markets Law, provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the license provided for by Article 21 of the Agriculture and Markets Law other than (1) by having refused to agree in writing, on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or before said date not to sell within the State of New York milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions, or (2) by the sale to or the purchase from said plaintiff by any person, firm, corporation or association of any such milk purchased by plaintiff from producers without the State of New York at a price lower than that required to be paid producers for milk produced within the State under similar conditions; and why the plaintiff should not have such other and further relief as to the Court may seem just and equitable in the premises;

And it further appearing from the verified bill of complaint filed herein, and the said affidavit of Walter J. Seelig, that this is a proceeding to restrain the above named defendants, and each of them, in their respective official capacities, from doing or causing or permitting to be done, directly or indirectly, any of the acts or things hereinabove [fol. 109] set forth; and an interlocutory injunction being prayed for herein;

And this motion being filed pursuant to the provisions of Sections 380, 381 and 382 of Title 28, United States Code

(Judicial Code, Section 266, amended) for the issuance of a temporary restraining order upon the grounds set forth in the bill of complaint and the said affidavit of Walter J. Seelig, to prevent immediate and irreparable injury, loss and damage which would otherwise result to the plaintiff before the hearing and determination of the application for interlocutory injunction herein may be had, or notice thereof be served, because the defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, and Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, have notified the plaintiff that they will refuse to grant to the plaintiff the license which plaintiff is required to obtain to conduct its business on or after May 1, 1934, as a milk dealer pursuant to the provisions of Section 258 of Article 21 of the Agriculture and Markets Law of the State of New York, unless the plaintiff shall, on or before April 30, 1934, have agreed in writing to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular unless the plaintiff shall agree in writing not to sell within the State of New York, after it has come to rest within said State, milk or cream purchased from producers without the State at a price lower than that required to be paid to producers for milk or cream produced within the State under similar conditions; and also because the said defendants have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets [fol. 110] Law if the plaintiff shall, without having first obtained the said required license, on or before April 30, 1934, continue its business as a milk dealer on or after May 1, 1934; and also because the said defendants have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets Law if the plaintiff shall sell or attempt to sell within the State of New York milk or cream purchased from producers without the State at a price lower than that required to be paid to producers for milk or cream produced within the State under similar conditions; and also because, if the plaintiff complies with and obeys the provisions of the said Agriculture and Markets Law and the said rules and orders promulgated by the said Commissioner the plaintiff's contracts with the creameries from which it obtains its milk will be abrogated and breached and

its entire business existence threatened with extinction; and the plaintiff further making its application to this Court for a hearing in this cause for an interlocutory injunction in accordance with the said Sections 380, 381 and 382 before three judges, one of whom at least shall be a Circuit Judge of the United States, as provided in the said Section 380, Now, therefore this Court being fully advised, it is

Ordered that the application for such interlocutory injunction be heard on the 8th day of June, 1934, at 10:30 o'clock in the forenoon, in Room 235, Old Post Office Building, Borough of Manhattan, City of New York, State of New York, before three judges, as provided in the said Section 380; and it is further

Ordered that the defendants, and each of them, in their respective official capacities, be and they hereby are restrained [fol. 111] until the hearing and determination of the application of the plaintiff for its interlocutory injunction herein from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, any action, suit or proceeding at law or in equity or any criminal action or proceeding against the plaintiff or any officer, agent or employee thereof by reason of the plaintiff continuing on or after May 1, 1934, its business as a milk dealer without having first obtained the license required by Article 21 of the said Agriculture and Markets Law or against any other person, firm, corporation or association or any officer, agent or employee thereof or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association purchasing milk from or selling milk to the plaintiff or in any way dealing in or handling milk of the plaintiff although the plaintiff shall not have obtained the license required by Article 21 of the said Agriculture and Markets Law; Provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the licenses provided for by Article 21 of said Agriculture and Markets Law other than by refusing to agree in writing on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or be-

fore said date not to sell within the State of New York milk or cream purchased from producers without the State at a price lower than that required to be paid to producers for milk or cream produced within the State under similar conditions.

[fol. 112] And it is further ordered that the plaintiff file a bond conditioned as required by law in the sum of $2,000 for the payment of all damages which may accrue by virtue of the issuance of this temporary restraining order;

And it is further ordered that this order shall be in full force and effect and shall be obligatory and binding upon the defendants, and each of them, and all persons acting by, through or under them, upon the service of a copy thereof upon them or upon their solicitor or solicitors of record in this cause;

And it is further ordered that a copy of the bill of complaint herein, a copy of the said affidavit of Walter J. Seelig and a copy of this order be served upon Honorable Herbert H. Lehman, Governor of the State of New York, by mail, on or before the 4th day of June, 1934.

This order, signed at New York on the 31st day of May, 1934, at 4:45 o'clock P. M.

Robert P. Patterson, United States District Judge.

[fol. 113] IN UNITED STATES DISTRICT COURT

[Title Omitted]

AFFIDAVIT OF KENNETH F. FEE

UNITED STATES OF AMERICA,
State of New York,
Northern District:

Kenneth F. Fee, being duly sworn, deposes and says: I am a defendant herein, and from official records of the Department, testimony by Walter J. Seelig and other competent sources I allege on information and belief the following facts:

Seelig Creamery Corporation is a domestic corporation of the State of New York. Its treasurer and sole stockholder is Walter J. Seelig. Its business address is 522 West 29th Street, New York City. It owns and operates a milk

receiving station or plant at Fair Haven, Vermont. About 450 cans of milk are received there daily from about 125 farmers. All of this milk goes to New York City by rail, in 40 quart cans, some in the form of milk and some in the form of cream. Usually the milk is pasteurized at the Fair Haven plant.

[fol. 114] G. A. F. Seelig, Inc., also is a domestic corporation, and its business address is the same given for Seelig Creamery Corporation. It has outstanding 400 shares of common stock and no preferred. Walter J. Seelig is treasurer and owns 250 shares. Gustav R. Seelig is secretary and owns 150 shares. The president, G. A. F. Seelig, owns no stock. G. A. F. Seelig, Inc., buys no milk directly from producers. It obtains its principal supply of milk from Seelig Creamery Corporation. Although it receives a comparatively small amount of milk and cream from other dealers, including some Grade A milk, those transactions will be ignored for purposes of this description of the business.

A copy of a contract dated March 20, 1933, between the two corporations is annexed hereto and made a part hereof. This contract expired March 31, 1934, but from allegations of the petitioner it may be inferred that a somewhat similar contract was entered into for the following twelve months. No copy of the present contract, if any there is, can be found in the office of the New York City Health Department.

The building at 522 West 29th Street, New York City, used as an office address by both corporations, is a one-story brick milk distributing plant, with a partial second story used for office space, and it is leased by G. A. F. Seelig, Inc., from another corporation. G. A. F. Seelig, Inc., sells milk and cream in New York City to hotels, restaurants, clubs, hospitals and stores. Most of this milk and cream is delivered to customers in 40 quart cans, although about 10% is in bottles.

The milk and cream, pasteurized and in cans owned by G. A. F. Seelig, Inc., is loaded into railway cars at Fair Haven, Vermont, consigned to G. A. F. Seelig, Inc., at New York City. The daily shipment is somewhat over 200 cans of milk and about 20 cans of cream, which makes about a carload, and is shipped each day as a carload lot. Upon arrival in New York City the car is opened, some cans are taken upon trucks of G. A. F. Seelig, Inc., to the

[fol. 115] customers, and some are taken to the 29th Street plant and either called for by customers or sent out in trucks of G. A. F. Seelig, Inc., for delivery to customers. The corporation has no bottling facilities of its own, but has some bottling done for it in New York City by another milk dealer.

On May 12, effective May 16, by an order known as Official Order Number 17, the Milk Control Board established certain minimum prices to be paid by milk dealers to producers for milk. This order was subsequently amended by Official Order Number 19 (see Bill of Complaint, pages 44-55), Official Order Number 28, Official Order Number 32 (effective July 1), by Official Order Number 34 (effective July 21), by Office Order Number 41 (effective September 18), by Official Order Number 43 (effective October 16, 1933), and by Official Order Number 58 (effective February 16, 1934). Each of these orders established prices in accordance with the "classified price plan", and under each of them the price for Class 1 milk, or milk used for fluid milk, was highest. From May 16 to July 20, inclusive, the price for a hundredweight of milk testing 3.5 percent butterfat, delivered at a plant 201-210 miles from New York City was $1.88, and from July 20 until February 16 the corresponding price was $2.30½. Such prices were subject to a minus differential, if milk was delivered to a plant more than 200 miles from New York City for utilization there, and Fair Haven is more than 200 miles from New York City. Thus, for 3.5% milk delivered at Fair Haven during the above mentioned period a freight differential of 2c would be subtracted from these prices.

To safeguard and make effectual the provisions in the law and in the orders of the Board that milk shall be purchased at certain minimum prices paid by consumers and reflected back in payments to producers it was found necessary to exercise further the price powers of the Milk Control Board and provide that intermediate transactions be at prices appropriately related to the price required to be [fol. 116] paid to producers. It was found by the Board as a matter of experience that certain dealer-to-dealer transactions took place at lower price levels than those established by the orders of the Board, frequently at a price established by a contract antedating the activities of the Board and fixing the price at the Sheffield or some other blended price plus a certain price per hundred-weight to

cover country plant handling costs, and that such transactions exposed each dealer involved to a strong temptation to violate the price orders of the Board. In the case of the dealer buying from producers and selling to another dealer at a lower price than the price level established by the Board for payments to producers, there was obvious danger that the dealer either would become bankrupt or would find some device to pay the producers at a lower rate. In the case of the dealer buying from a dealer at a lower rate than his competitors could buy there was danger that he would pursue the advantage by cutting prices to obtain additional business for the resale of such milk. The realization of each danger was observed in several cases, which led the Board, on June 30, effective July 1, to make Official Order Number 33. (See Bill of Complaint, page 56). This order, in substance, forbids a dealer-to-dealer sale at any price below the price established to be paid to producers plus costs of handling, transporting and processing the milk to the place and condition involved in such sale.

As applied to G. A. F. Seelig, Inc., Official Order Number 33 forbade it to buy milk from Seelig Creamery Corporation, for Class 1 utilization in New York City, at a price less than the applicable Class 1 price fixed by the orders above referred to, minus 2¢ per hundredweight in the case of milk delivered at Fair Haven, plus a country plant handling charge to be determined at the actual cost of handling such milk. The order had a similar effect as to Class 2-A milk. All the milk handled by Seelig Creamery Corporation and G. A. F. Seelig, Inc., is so used in New York City as to be either Class 1 or Class 2-A milk, more [fol. 117] than half of it falling into Class 1.

All during the period for which the orders mentioned were effective Seelig Creamery Corporation continued to deliver to G. A. F. Seelig, Inc., and it in turn continued to sell in New York City, after it had come to rest there, quantities of milk averaging considerably more than 20,000 pounds daily for which the producers at Fair Haven were paid blended prices much lower than those which should have been paid based on utilization in accordance with the Board's orders. A schedule hereto annexed shows the differences involved.

G. A. F. Seelig, Inc., does not object to paying Seelig Creamery Corporation the amounts required to comply with Official Order Number 33 and the other orders mentioned

above; at least it did comply with them by an additional payment in November 1933 after its non-compliance was called to its attention by suit. Apparently its unwillingness relates entirely to payments from Seelig Creamery Corporation to producers, and the two corporations insist upon the right of Selling in New York City, after it has come to rest there, milk purchased from Vermont producers at prices less than must be paid by competitors buying from New York State producers. The result will be, if that position has constitutional support, either that G. A. F. Seelig, Inc., can compete for business in New York City at a price lower than its competitors can afford to sell (and incidentally involving a violation of certain orders) or that the Seelig interests, through one or the other of the corporations operated as part of a common plan, will derive at the expense of Vermont producers a profit in excess of any that can be obtained by dealers handling New York State milk. In either case there is entailed the eventual destruction of the legislative plan embodied in the Milk Control Law. Producers within New York State, for twelve months [fol. 118] and more forbidden to compete on a low price basis for the milk markets of their State, are being subjected to an unfair price competition by producers without the State, and such competition threatens, if continued and others are encouraged to join therein, to break down the minimum prices established to be paid to the producers within New York State.

Approximately 70 percent of the milk and cream marketed and consumed in the New York City market is produced in New York State and approximately 30 per cent comes from other states. The quantities and origins of such milk and cream for April 1934 (the most recent month for which the report of the U. S. Dept. of Ag. is at hand) appear by a schedule hereto annexed.

Kenneth F. Fee.

Sworn to before me this 7th day of June, 1934.
Mary E. McAuliffe, Notary Public.

[fol. 119] EXHIBIT TO AFFIDAVIT

Memorandum of agreement made this 20th day of March 1933 by and between the Seelig Creamery Corporation, of

522 West 29th Street, Borough of Manhattan, City of New York, hereinafter called the Seller, and G. A. F. Seelig, Inc., of 522 West 29th Street, Borough of Manhattan, City of New York, hereinafter called the Buyer, witnesseth:

That in consideration of the covenants and agreements of each other herein contained each of the parties hereto agree with the other as follows:

1. That this agreement is for a period from April 1st, 1933, to and including March 31st, 1934.

2. The Buyer agrees to buy and the Seller agrees to sell daily shipments of milk and cream amounting to the entire output of the Seelig Creamery Corporation plant owned by the Seller, at Fair Haven, Vermont.

3. The price of milk is to be based on the price of the Sheffield Farms Company, New York City, returned to their producers in the basic zone of the New York Milk Shed, for one-hundred pounds of milk containing 3% butterfat, plus handling charges of 40¢ per can of forty quarts, and four cents for each one-tenth of one percent above 3% butterfat.

4. In the event the output of milk of the Seller exceeds the requirements of the Buyer, the Buyer shall have the option of receiving shipments of light cream and/or heavy cream testing 20% and 40% respectively for such excess of milk produced by the Seller, said light cream and/or heavy cream to be priced proportionately to the current price of milk on the Sheffield basis referred to in paragraph #3 above.

[fol. 120] 5. Payments on this agreement are to be made by the Buyer semi-monthly.

6. The Seller agrees that all products are to be up to the standards of the New York Board of Health requirements, and such products to be legal for sale in the New York City market.

7. It is further understood and agreed that the Buyer shall keep, at all times, sufficient cans at the shipping plant at Fair Haven, Vermont, to take care of the daily shipments.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

Seelig Creamery Corporation, by W. J. Seelig, Treasurer. Witness: B. Ackerman. G. A. F. Seelig, Inc., by G. A. F. Seelig, Pres. Witness: J. Jackson.

[fol. 120½] [Endorsed:] In the District Court of the United States for the Southern District of New York. G. A. F. Seelig, Inc., Plaintiff, against Charles H. Baldwin, as Commisioner of Agriculture and Markets of the State of New York, and others, Defendants. In Equity No. 78-174. Answering Affidavit. John J. Bennett, Jr., Attorney General; Henry S. Manley, Counsel to the Milk Control Division, Solicitors for Defendants.

[fol. 121] EXHIBIT TO AFFIDAVIT

United States Department of Agriculture

Bureau of Agricultural Economics

Market News Service

Total Receipts at New York and Metropolitan Area, Rail and Truck, April, 1934

State of Origin	Milk—40 Qt. Units			Cream—40 Qt. Units		
	Rail	Truck	Total	Rail	Truck	Total
N. Y.	1,204,401	498,479	1,702,880	79,704	19,238	98942
N. J.	30,902	256,844	287,746	778	1,276	2,054
Pa.	303,218	140,685	443,903	13,425	4,208	17,633
Vt.	95,607	10,777	106,384	7,134	659	7,793
Conn.	16,581	.....	16,581	462	.....	462
Md.	12,709	.....	12,709	.....	.....	.....
Del.	3,170	.....	3,170	25	.....	25
Ohio	5	.....	5	2,787	.....	2,787
Ind.	.....	.....	.....	690	.....	690
Mich.	.....	.....	.....	200	.....	200
Mass.	.....	11,493	11,493	.....	246	246
Totals	1,666,593	918,278	2,584,871	105,205	25,627	130,832

[fol. 122]

EXHIBIT TO AFFIDAVIT

Seelig Creamery Corporation

Period	Lbs. Rec'd	Test	Payments		Board Minimum		Under Payment	
			Rate	Amount	Rate	Amount	Rate	Amount
May 16–31, 1933	581984	3.734	1.394	8110.53	1.702	9908.21	.308	1797.68
June	1113771	3.642	1.417	15781.60	1.656	18444.05	.239	2662.45
July1–20	627607	3.6547	1.552	9739.71	1.808	11347.13	.256	1607.42
July 21–31	296639	3.6878	1.825	5414.01	2.242	6650.65	.417	1236.64
August	803766	3.832	2.033	16339.75	2.286	18372.72	2.253	2032.97
September	850993	3.9274	1.951	16602.57	2.303	19598.37	.352	2995.80
October	917134	4.047	1.959	17965.10	2.345	21506.79	.386	3541.69
November	711460	4.06	2.077	14779.75	2.484	17672.67	.407	2892.92
December	706829	4.04	2.017	14259.43	2.501	17677.79	.484	3418.36
January, 1934	720237	3.975	1.94	13972.64	2.475	17823.35	.535	3850.71
February	612263	3.9416	1.926	11796.52	2.387	14620.80	.461	2824.28
March	748763	3.799	1.620	12128.34	2.216	16336.96	.596	4408.62
								33,269.54

[fol. 123] In United States District Court, Southern District of New York

G. A. F. Seelig, Plaintiff,

against

Charles H. Baldwin, Commissioner, and others, Defendants

Before L. Hand, Circuit Judge, and Bondy and Patterson, District Judges

On return to an order to show cause why the defendants should not be enjoined from refusing to grant the plaintiff a license to sell milk in the State of New York under the Agriculture and Markets Law; and from prosecuting it for selling milk without a license. On motion of the defendants to dismiss the bill.

J. J. O'Connor, for the Plaintiff.
Henry S. Manley and Henry Epstein, for the Defendants.

Opinion—Filed Aug. 2, 1934

L. Hand, Circuit Judge:

This case comes up before a special court constituted under Section 380, of Title 28, of the U. S. Code, to enjoin the defendants from enforcing Section 258 (m) (4) of Article 21-a of the Agriculture & Markets Law of the State of New York, enacted April 1, 1934, and an order of the Milk Control Board of the State issued July 1, 1933, under an earlier act of the same purport. The plaintiff is a milk dealer who buys its supplies in Fairhaven, Vermont, principally from the Seelig Creamery Company. The majority of the shares of the two companies are owned by the same persons, although the companies themselves are separate. The creamery buys its milk of Vermont farmers, and sells it to the plaintiff in Vermont in cans, which the plaintiff ships by rail to the City of New York. Some of the milk [fol. 124] the plaintiff sells direct in the cans delivered to it by the creamery company; some it bottles and distributes to its customers in that form. The State of New York has

created a system of price control over the sale of milk, in pursuance of which it has provided that, so far as such a prohibition is constitutionally lawful, no milk shall be sold within the State which is bought outside at prices less than those fixed for the purchase of milk from farmers within the State. This is Section 258 (m) (4) and is quoted in the margin.* Under an identical section, viz., Section 312 (g) of Article 25, enacted in the year 1933, the Milk Control Board of New York on July 1, 1933, passed an order construing this language by forbidding the continuous purchase of milk outside the State, followed by its use within the State, if the milk was bought for less than the minimum price fixed for purchase within the State. This order is likewise quoted in the margin;† and remained in force after the passage of the law of 1934. The defendant [fol. 125] Baldwin is Commissioner of Agriculture & Markets, and the successor in function to the Milk Control Board; he has refused to issue a license to the plaintiff to

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* It is the intent of the legislature that the instant, whenever that may be, that the handling within the State by a milk dealer of milk produced ouside of the state becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the State purchased under similar conditions, shall be unlawful.

† Any continuous and regular purchase or sale or delivery or receipt of milk passing to a milk dealer at any place and available for utilization as fluid milk and/or cream within New York State, followed by such utilization in one or more instances, where the price involved in such purchase or sale or delivery or receipt is less than the sum of the minimum price established to be paid to producers for such milk plus actual costs of transporting and handling and processing such milk to the place and to the conditions involved in such purchase or sale or delivery or receipt, hereby is forbidden.

sell milk in New York, unless it agrees to obey all orders of the former board and of himself, including that just mentioned. The plaintiff has refused, asserting among other things that the act and the order in conjunction are an unconstitutional interference with interstate commerce. It now moves for an injunction pendente lite, to which the defendants counter with a motion to dismiss the bill. The defendants, other than Baldwin, are the Director of the Division of Milk Control; the Attorney General and the District Attorney of the County of New York. The first is alleged to be acting in conjunction with the commissioner, and the others to be threatening to prosecute the defendant for selling milk without a license.

The jurisdiction of this court is conceded and indubitable, except that a question is raised whether the constitutionality of the act is at stake as contrasted with its interpretation. The argument is, that since it expressly confines its ambit to such subject matter as is constitutionally within the State's power, there cannot be a conflict between it and the Constitution; ex vi termini the legislature stops exactly where, if it went further, its action would be forbidden. We should doubt whether this could avoid the issue of constitutionality; since the act professes to go as far as it can, its interpretation involves the meaning of the Constitution. Be that as it may, such a statute, strictly speaking, enacts nothing but a hypothesis, and is necessarily brutum fulmen until some official supplies the condition by enforcing it in a concrete instance. When as here he does so by a regulation, the constitutionality of his act must be passed on by a court organized under Section 380 of Title 28. Then at any rate the issue becomes one of the constitutionality of the regulation. We proceed to the merits.

The doctrine was not a priori inevitable that, even though Congress had not exercised its paramount power, the States might not in the management of their internal affairs impinge upon interstate commerce. Cf. License Cases, 5 How. 504. Section 8 of Article I, merely conferred [fol. 126] powers on Congress; it fo-ad nothing; it was section 10 alone that took away the States' powers, and though part of it did indeed deal with the same subject-matter, it was very limited in scope. It might have been held that this was the measure of the States' incapacity

until Congress chose to act. But the contrary is now so thoroughly established as to need little citation, and the question is always whether the State has "directly" regulated interstate commerce. The Minnesota Rate Cases, 230 U. S. 352, 396; Missouri v. Kansas Gas Co., 265 U. S. 298, 307. Section 258 (m) (4) does not forbid the importation of milk into New York from outside; it merely prevents its sale when it gets there, unless it has been bought at the price which must be paid for similar milk in New York. Conceivably such a regulation might have been held to touch interstate commerce only "indirectly," and thus to be lawful until Congress stepped in. But again the opposite view prevailed; it is a "direct" restraint to forbid sale after the goods arrive, provided they are still a part of interstate commerce. Brown v. Maryland, 12 Wheat. 419, 447; Leisy v. Hardin, 135 U. S. 100, 111; Schollenberger v. Pennsylvania, 171 U. S. 1, 22; Savage v. Jones, 225 U. S. 501, 520; Missouri v. Kansas Gas Co., supra, (265 U. S. 298). Moreover, although for fiscal purposes the doctrine of the unbroken package no longer fixes the term of interstate commerce, (Sonneborn Bros. v. Cureton, 262 U. S. 506), when the issue is of the state's general municipal power over goods going to, or coming from, another state, we understand that the doctrine of Brown v. Maryland, supra, (12 Wheat. 419), still obtains. Leisy v. Hardin, supra, (135 U. S. 100); Schollenberger v. Pennsylvania, supra, (171 U. S. 1); Austin v. Tennessee, 179 U. S. 342, 348; Price v. Illinois, 238 U. S. 446, 454, 455; Hebe Co. v. Shaw, 248 U. S. 297, 304. Whatever may be thought of so accidental a measure for the distribution of governmental powers, in view of the recent approval of the doctrine, it does not seem to us that an inferior court is free to treat it as open to debate. So far as we are to have a more realistic canon, it must be worked out step by step by the Supreme Court. Indeed in Austin v. Tennessee, supra, that court refused to accept the doctrine with verbal rigidity. Moreover, if the goods do not come in packages at all, there may be a substitute step by which they pass into the domestic stock of goods. Public Service Com. v. [fol. 127] Landon, 249 U. S. 236; Pennsylvania Gas Co. v. Public Service Com., 252 U. S. 18; Missouri v. Kansas Gas Co., supra, (265 U. S. 298). For instance in the case of moving picture films, though not boxed, the critical event is

their exhibition. Mutual Film Corporation v. Ohio Industrial Co., 236 U. S. 230, 241. None of the exceptions need concern us here as to the milk sold by the plaintiff in the original cans; these are bona fide unbroken packages; they are still a part of interstate commerce, and the State has no power to forbid their sale unless by virtue of some excuse, of which more in a moment. As to the bottled milk, the opposite is true; the State may control it at its pleasure; it is part of the mass of its domestic goods; and although in so doing the State in effect fixes the price at which the milk shall be bought elsewhere, the sanction is local, and it is otherwise unobjectionable. Save for her Federal duties, New York might forbid the entry of Vermont milk altogether, if she thought such milk likely to break down her policy of protecting her farmers or of securing a steady supply for her people.

Generally the power of the States has been said to rest solely upon the two questions we have already mentioned; that is, whether the goods are still in interstate commerce and whether the statute "directly" affects it. The accepted theory certainly is that the power does not depend upon the purposes which the state may have in mind, the concept is morphological rather than functional. But there are some decisions which it is very hard to fit into that pattern, which seem to turn not so much upon where the statute intervenes in the economic history of the goods, or how diffuse its effect may be when it does, as upon what is the justification for any intervention at all. One of these is Silz v. Hesterberg, 211 U. S. 31, 43; where the entry of game from elsewhere was prohibited as an incident to the protection of the local game supply. Certainly the act impinged as directly as possible upon the movement of foreign game which entered in its original wrappings; we can see no other explanation than that the purpose justified the power. It is possible to explain Geer v. Connecticut, [fol. 128] 161 U. S. 519, on another theory; that is, that the embargoed game has no yet become separated from the mass of local goods, and that interstate commerce had therefore not commenced. But that was not the ground on which it proceeded, any more than it was the ground of Sligh v. Kirkwood, 237 U. S. 52, which must stand like the game cases as an instance where the purpose excused. Besides, it is not always true that goods must have started

upon their interstate movement, or be even segregated for that purpose, before they enter interstate commerce. Oklahoma v. Kansas Mut. Gas Co., 221 U. S. 229, 255. Lemke v. Farmers Grain Co., 258 U. S. 50, 55, 56; Pennsylvania v. West Virginia, 262 U. S. 553, 598; Foster Packing Co. v. Haydel, 278 U. S. 1. Hall v. Geiger-Jones Co., 242 U. S. 539, 557-559, may indeed be distinguished, because although the court expressly refused to find that the securities had become part of the local mass of goods, it dealt with the statute as an inspection law, like Plumley v. Massachusetts, 155 U. S. 461; Crossman v. Lurman, 191 U. S. 189; Patopsco Guano Co. v. North Carolina, 171 U. S. 345; Savage v. Jones, supra, (225 U. S. 501), and many others. In such cases although the state lays its hand directly upon goods while in interstate commerce, yet if it does so only to determine whether they are sound, or truly marked, or the like, it has that power. The recognition of inspection laws in Section 10, Art. 1 seems to imply as much. It could indeed be argued that as inspection presupposes a standard to which the goods must conform, and power to exclude them if they do not, the State ought to be able to enforce standards that demand no inspection. This is perhaps no more than to argue that the recognition of the validity of inspection laws proves that the States had general powers except as denied in section 10. Be that as it may, inspection laws have historically an ascertainable, if a somewhat vague, meaning; they may be valid merely as an expressed exception, and it is so that they must be regarded unless much else is to be treated as not seriously spoken. Railroad Co. v. Husen, 95 U. S. 465, 473; Brimmer v. Rebman, 138 U. S. 78; Vance v. Vandercook, 170 U. S. 438, 455, 456; Reid v. Colorado, 187 U. S. 137, 151, 152. Foster Packing [fol. 129] Co. v. Haydel, supra, (278 U. S. 1), perhaps depended upon the discrimination which the State was attempting, in which it was like Minnesota v. Barber, 136 U. S. 313. The effort was to secure a monopoly of the shelling of the State's shrimps, just as in Minnesota v. Barber it was to obtain a monopoly of butchering meat. But the discriminatory effect of the law was not pressed, and the decision seems rather to rest upon the fact that unlike Geer v. Connecticut, supra, (161 U. S. 519), the State had relinquished all interest in the shell-fish, and that its

only other possible motive, i. e., to establish an industry, was no excuse.

We do not think that it is necessary to go further than suggest from these cases that the venture on which the State is engaged may at times excuse its interference; that its intervention is not always condemned because it interposes "directly" upon the goods while they are still a part of interstate commerce. Assuming for argument that there may be such instances, the motive in the case at bar will not serve. We do not of course mean that the plan is not commendable in itself, or that the means are not well adapted to the end. Nebbia v. N. Y., 291 U. S. 502, has authoritatively settled the State's power, and it is easy to see how the whole scheme might be imperilled, and conceivably wrecked, unless foreign milk, bought at cut prices, could be kept out of competition with the domestic supply. Furthermore, though a complete exclusion would give even greater security, it might have been open to a charge of unfair discrimination, which cannot be made as it is. The act does not try to circumscribe the "milk-shed" as equal competition defines it; it merely prevents price-cutting throughout its area. So put, there is much to be said for the propriety of the extraterritorial feature, and Congress might well be induced to sanction it as it stands. But that sanction is, we think, essential to its validity. The situation is indeed scarcely distinguishable at all from Schollenberger v. Pennsylvania, supra, (171 U. S. 1), and so far as it is, presents a weaker case for the state's power. In that case the act was unsuccessfully defended as an inspection law, since oleomargarine might easily stimulate real [fol. 130] butter. But it had another side, like the milk here, the substitute was probably in fact prohibited only because it competed with dairymen; and though this was not argued, that was almost certainly because in 1898 the court would have at once rejected it. A fortiori the case at bar is therefore within that decision, for no pretence can here be made that this is an inspection law. Although the section in question may be a reasonable incident to the State's internal economic polity, nevertheless it seeks to protect a local industry by excluding foreign competing goods, and that is exactly the kind of activity against which the commerce clauses are primarily directed. Their occasion was the mutual jealousies and aggressions of the

States, taking form in customs barriers and other economic retaliation. Farrand, Records of the Federal Convention, Vol. II, p. 308; Vol. III, p. 478, 547, 548; the Federalist, No. XLII; Curtis, History of the Constitution, Vol. I, p. 289, 290, Story on the Constitution, Section 259. The implied prohibition in Section 8 is less definite than the express one in section 10, but so far as there may be any exceptions to it, based upon the purposes of the State, they cannot include the exclusion of competing goods because they compete. That at least is forbidden by the genesis of both clauses, and the express content of the second. No matter what the local need, as a nation we are without protective economic barriers between the States, certainly until Congress sees fit to allow them, and it makes no difference that they do not take the form of duties of imposts under Section 10 of Article I. The State's intervention in the case at bar is indeed closely parallel in its result to a customs duty. Such a duty pro tanto secures the market to the local supply through the resulting rise in price; and that is the avowed object of this law; it will allow no foreign milk to enter unless it has already cost enough to make sure that it must compete on equal terms. The Constitution denies to a State that kind of economic sanction, and puts it in the hands of the public authority charged with the national welfare. So far as the act attempts to prevent [fol. 131] the import of milk in cans it is therefore invalid.

The motion to dismiss the bill is denied. An injunction pendente lite will be granted forbidding the defendants to exact from the plaintiff as a condition of granting a license any agreement not to sell milk in cans in New York which has been bought in Vermont at lower prices than those prescribed for the purchase of milk in New York. This opinion will stand as findings of fact and conclusions of law under Equity Rule 70½, unless objection is made.

I concur: Wm. Bondy, Robert P. Patterson, District Judges.

[File endorsement omitted.]

[fol. 132] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUBMISSION OF MOTIONS AND STIPULATION OF FACTS—Filed Nov. 21, 1934

It is hereby stipulated, by and between the attorneys for the respective parties herein, that there be submitted to the Court the application of the plaintiff for a final injunction as prayed in its bill of complaint, and the motion of the defendants to dismiss the bill. For the purpose of this submission the following facts are submitted with the intention that it have the same effect as though proven upon a trial and uncontradicted:

1. The plaintiff, G. A. F. Seelig, Inc., is a domestic corporation of the State of New York, and a resident of the Southern District of that State.

2. The defendant Charles H. Baldwin is the Commissioner of Agriculture and Markets of that State; the defendant Kenneth F. Fee is Director of the Division of Milk Control in the Department of which said Commissioner is the chief executive officer; the defendant John J. Bennett, Jr., is Attorney General of that State; the defendant William C. Dodge is District Attorney of New York County. Each of the above named defendants maintains in the Southern District of New York State an office for transaction of his official business.

[fol. 133] 3. The amount in controversy in this suit exceeds the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

4. The plaintiff is engaged and at all times hereinafter mentioned and for many years prior to April 10, 1933, was continuously engaged in the business of purchasing and handling and selling fluid milk and cream in and about the City of New York, State of New York, said City having a population of over one million inhabitants. The plaintiff has built up a large and extensive business in the said City in the sale of fluid milk, chiefly in can lots, to consumers and to hospitals, grocery stores, hotels, restaurants, soda fountains, dairy products stores and similar mercantile estab-

lishments, and has owned and operated a plant in the Borough of Manhattan, City of New York, for many years, for the distribution and sale of fluid milk and cream in and about the City of New York, in wholesale lots, that is, chiefly in "can lots", as distinguished from bottled milk, as hereinabove stated. The plaintiff, in handling approximately 20,000 pounds of milk daily is, in comparison with others engaged in the same branch of the milk business in New York City, one of the smaller milk dealers.

5. The plaintiff obtains its principal supply of milk from Seelig Creamery Corporation.

6. Seelig Creamery Corporation also is a domestic corporation of the State of New York. It owns and operates a milk receiving station or plant at Fair Haven, Vermont.

7. A copy of a contract dated March 20, 1933, between the plaintiff and Seelig Creamery Corporation is annexed hereto and marked "Exhibit A" and made a part hereof. This contract expired March 31, 1934, but a similar contract for the subsequent twelve months now is in effect.

[fol. 134] 8. Seelig Creamery Corporation buys from certain selected farmers or producers of the milk shed in and about Fair Haven, Vermont, all of the milk offered to it daily. About 450 forty-quart cans of milk are received there daily from about 125 farmers. This milk is pasteurized there (excepting milk which is to be bottled in New York City) and some of it is separated into cream. All of this milk goes to New York City by rail, in forty-quart cans, some in the form of milk and some in the form of cream. Each day the milk and cream, pasteurized and in cans owned by the plaintiff, is loaded into a railway car at Fair Haven, Vermont, consigned to the plaintiff at New York City. The daily shipment is somewhat over 200 cans of milk and about 20 cans of cream, which is shipped each day as a carload lot, F. O. B. Fair Haven, Vermont.

9. In New York City, at 522 West 29th Street, the plaintiff maintains a one-story brick milk distributing plant, with a partial second story used for office space.

10. Upon arrival in New York City of the daily carload of milk from Fair Haven, Vermont, the car is opened, some cans are taken upon the plaintiff's trucks to the customers, and some are taken to the 29th Street plant and either

called for by customers or sent out in plaintiff's trucks for delivery to customers. The sales by the plaintiff of milk and cream are mostly to hotels, restaurants, clubs, hospitals and stores in New York City, and mostly it is delivered in the same forty-quart cans in which it came from Fair Haven, Vermont.

11. About 10% of the milk is bottled in New York City and delivered to customers in bottles. Plaintiff has no pasteurizing and bottling facilities of its own in New York City, and this work is done for it by another milk dealer.

[fol. 135] 12. The business of Seelig Creamery Corporation is conducted under and pursuant to the laws of the State of Vermont as a foreign corporation in that State, licensed to do business in and by that State, and under and pursuant to the laws of Vermont governing the operations of creameries in that State. The operations of Seelig Creamery Corporation are confined wholly to the State of Vermont, and at all times hereinafter mentioned and for many years prior to April 10, 1933, it so conducted its business. The plaintiff and Seelig Creamery Corporation are, and at all times hereinafter mentioned were, wholly separate and distinct corporate entities and neither corporation owns, holds or controls stock in the other.

13. The plaintiff and Seelig Creamery Corporation each uses 522 West 29th Street, New York City, as a business address. The plaintiff has outstanding 400 shares of common stock and no preferred. Walter J. Seelig is treasurer and owns 250 shares. Gustav R. Seelig is secretary and owns 150 shares. The president, G. A. F. Seelig, owns no stock. Walter J. Seelig is treasurer of Seelig Creamery Corporation and its sole stockholder.

14. The plaintiff has duly obtained from the Board of Health of the City of New York all such licenses and permits as are required by the Sanitary Code of the said City or the regulations adopted thereunder for the lawful conduct of the plaintiff's said business, and the plaintiff has duly kept, observed and performed all the provisions of said Sanitary Code and the regulations adopted thereunder.

15. The enactment and language of chapter 158 of New York Laws of 1933, and of chapter 126 of New York Laws of 1934, are stipulated.

[fol. 136] 16. On May 12, 1933, effective May 16, 1933, the Milk Control Board adopted an order known as Official Order No. 17, a full, true and correct copy of which is annexed hereto, and marked "Exhibit B" and made a part hereof. Said order was subsequently amended by Official Order No. 19, Official Order No. 28, Official Order No. 32 (effective July 1, 1933), by Official Order No. 34 (effective July 21, 1933), by Official Order No. 41 (effective September 18, 1933), and by Official Order No. 43 (effective October 16, 1933). Official Order No. 17 (Exhibit B) established minimum prices to be paid by milk dealers to producers for milk in accordance with the "classified price plan," which price plan was and is based upon the ultimate utilization by the dealers of the milk so purchased. The subsequent official orders herein recited made certain amendments to or changes in the prices to be paid by the milk dealer to the producer, but did not materially change the general price structure set up by said Official Order No. 17 (Exhibit B).

17. On or about June 30, 1933, the Milk Control Board adopted an order known as Official Order No. 33, effective July 1, 1933, a full, true and correct copy of which is annexed hereto, marked "Exhibit C" and made a part hereof. Under and by virtue of the said Official Order No. 33 the purchase or sale by or to a milk dealer of fluid milk (followed by the utilization of the same within New York State) at a price less than the sum of the minimum price established by the Milk Control Board to be paid to producers for such milk, irrespective of where such producers might be located, was forbidden.

18. Official Order No. 17 (Exhibit B) and said Official Orders amendatory thereof, and Official Order No. 33, or other orders of similar tendency in each case, continue to be in full force and effect.

[fol. 137] 19. Under Official Order No. 17 and said Official Orders amendatory thereof the price of Class 1 milk, or milk used for fluid milk, was highest. From May 16 to July 20 inclusive of 1933 the price for a hundredweight of milk testing 3.5 per cent butterfat, delivered at a plant 201-210 miles from New York City, was $1.88; and from July 20, 1933, until February 16, 1934, the corresponding price was $2.30½. Such prices were subject to a minus

differential, if milk was delivered to a plant more than 210 miles from New York City for utilization in New York City, and Fair Haven, Vermont, is more than 210 miles from New York City. Thus, for 3.5 per cent milk delivered at Fair Haven during the above mentioned period a freight differential of 2 cents would be subtracted from the prices mentioned above.

20. All during the period for which the orders mentioned above were effective Seelig Creamery Corporation continued to deliver to G. A. F. Seelig, Inc., and it in turn continued to sell in New York City in the manner above described, quantities of milk averaging 20,000 pounds or more daily. For that milk the producers at Fair Haven, Vermont, were paid by Seelig Creamery Corporation prices lower than those which the Milk Control Board claimed should have been paid based upon utilization of the milk in accordance with the Board's orders. A schedule hereto annexed and marked "Exhibit D" and made a part hereof shows the differences involved.

21. Similar differences still continue. The plaintiff asserts and is exercising the right to sell in New York City, in the manner already described, milk purchased by it from Seelig Creamery Corporation and in turn purchased by that corporation from producers in Vermont at prices fixed by agreement between the corporation and producers, quite irrespective of the prices fixed by Official Order No. 17 and similar orders of the defendant Baldwin.

[fol. 138] 22. Approximately 70 per cent of the milk and cream marketed and consumed in the New York City market is produced in New York State and approximately 30 per cent comes from other state-. The quantities and origins of such milk and cream for April 1934, as reported by the United States Department of Agriculture, appear by a schedule hereto annexed and marked "Exhibit E" and made a part hereof. A substantial part of the milk produced in New York State and marketed and consumed in New York City passes through another state on its way to market.

23. Of the milk commerce included within that 30% some is handled in the manner herein described, some (particularly cream) in 40 quart cans transported from country

plants to the New York City market by trucks, some is pasteurized and bottled at the country plants and is shipped from the country plants in cases either by railroad or by truck, and a considerable quantity of milk is transported from country plants to said market in tank trucks, being drawn off into cans and for bottling and distribution upon arrival at said market.

24. As to the sale of milk by the plaintiff to consumers within the State of New York, and chiefly within the City of New York, where it finds its market, the plaintiff has at all times followed and complied with the rules and orders of the Milk Control Board governing such sales and the prices charged for its products.

25. The defendant Baldwin requires as a prerequisite to the granting of licenses required to be obtained by the plaintiff as a milk dealer under chapter 126 of New York Laws of 1934 that the plaintiff agree in writing to comply with and obey the provisions of such statute and the Official Orders promulgated by him. He requires the plaintiff to answer affirmatively the following two questions which appear in the application blank prepared by him:

[fol. 139] "Do you agree not to sell within New York State after it has come to rest within the State, milk or cream purchased from producers, without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions?"

"Do you agree that you will obtain for the Commissioner and supply to him, at such times and in such manner as he requires, concerning milk and cream produced without the State and in any way dealt in by you, data to whatever extent is necessary to ascertain or compute whether the producers were paid for such milk or cream a price not lower than that required to be paid producers for milk or cream produced within New York State and purchased under similar conditions?"

Unless the plaintiff does so agree and answer those two questions affirmatively the defendant Baldwin will not grant it such a license.

26. The defendants Baldwin and Fee have rejected plaintiff's application for a license and have refused to issue it a license because the plaintiff has refused to so agree and has refused to answer those two questions affirmatively and unconditionally. The application of the plaintiff was in all other respects duly made and unobjectionable.

27. The enactment and language of sections 38 to 41 inclusive of the Agriculture and Markets Law of the State of New York are stipulated.

28. The defendants, in their official capacities, have threatened to invoke against the plaintiff the remedies by civil suits and criminal prosecutions and otherwise provided in those sections, if the plaintiff continues its business as a milk dealer after May 1, 1934, without having first obtained the required license. The penalties so threatened are so numerous and so great that the plaintiff cannot risk them even for the purpose of testing the right which it is asserting herein, and unless the existence of the right is determined in this proceeding it must be surrendered without judicial determination.

[fol. 140] 29. The foregoing stipulation of fact is intended to present as concisely as possible and in an orderly manner the facts stated in the bill of complaint, the two supporting affidavits verified on May 28, 1934, by J. Daniel Dougherty and Walter J. Seelig respectively, and the answering affidavit verified on June 7, 1934, by Kenneth F. Fee. Although this stipulation is intended to be complete in itself, and not to need amplification from those sources, it may receive interpretation therefrom should it appear to be ambiguous in any particular. Failure to copy into this stipulation any allegation of those sources is not intended to reflect upon their correctness and shall not support an inference that this stipulation is to be narrowly interpreted in any particular.

John J. O'Connor, Solicitor for Plaintiff. John J. Bennett, Jr., Attorney General of the State of New York; Henry Epstein, Solicitor General; Henry S. Manley, Counsel to the Department of Agriculture and Markets, Solicitors for the Defendants.

[fol. 141] Exhibit—

A—Contract between Seelig Corps. appears as Exhibit in Fee Affdt.

B—Order #17, printed as Ex. "B" in Bill of Complaint.

C—Order #33, printed as Ex "C" in Bill of Complaint.

D—Table of Underpayments appears as Exhibit in Fee Affdt.

E—Milk shipments to N. Y. C. appears as Exhibit in Fee Affdt.

[File endorsement omitted.]

[fol. 142] In United States District Court, Southern District of New York

In Equity. No. 78-174

G. A. F. Seelig, Inc., Plaintiff,

against

Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, and others, Defendants

Final Decree—Filed Nov. 21, 1934

By stipulation of October 31, 1934, the parties hereto have submitted for decision the plaintiff's application for final injunction, opposed by the defendants, and the defendants have submitted for decision their motion to dismiss the bill of complaint, opposed by the plaintiff, and they also have submitted an agreed statement of facts. That agreed statement of facts is hereby adopted as findings of fact for the purposes of the present decision. The issues of law now involved are not substantially different from those which were determined in an opinion written in this case on or about August 2, 1934. Now, therefore it is

Ordered, adjudged and decreed that the defendants Baldwin and Fee be, and they hereby are, finally enjoined from exacting from the plaintiff G. A. F. Seelig, Inc. as a condition of issuing a license to said plaintiff to sell milk, an

agreement not to sell within the State of New York milk brought from another state if such milk was purchased from producers in such other state at a price lower than that [fol. 143] required to be paid for milk produced within New York State and purchased under similar conditions, so far as the selling is by the plaintiff while the milk is in the cans or other original packages in which the milk has been brought by the plaintiff from without the State of New York, and it is

Further ordered, adjudged and decreed that the defendants Bennett and Dodge be, and they hereby are, finally enjoined from prosecuting the plaintiff for selling within the State of New York milk brought from another state because such milk was purchased from producers in such other state at a price lower than that required to be paid for milk produced within New York State and purchased under similar condition, so far as the selling is by the plaintiff while the milk is in the cans or other original packages in which the milk has been brought by the plaintiff from without the State of New York, and it is

Further ordered, adjudged and decreed that the application of the plaintiff for a final injunction against the defendants be, and the same hereby is, denied in all other respects than is heretofore set forth, and it is

Further ordered, adjudged and decreed that the motion of the defendants to dismiss the bill be and the same hereby is denied.

Learned Hand, Circuit Judge; Wm. Bondy, U. S. D. J.; Robert P. Patterson, District Judges.

Dated November 16th, 1934.

[File endorsement omitted.]

[fol. 144] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS—Filed Dec. 14, 1934

To the District Court of the United States for the Southern District of New York and to the Honorable Judges thereof:

The defendants, Charles H. Baldwin as Commissioner, etc., and Kenneth F. Fee as Director, etc., and John J.

Bennett, Jr., as Attorney General, etc., feel themselves aggrieved by the final decree of this Court entered November 21, 1934, in the office of the Clerk, and they respectfully pray an appeal therefrom to the Supreme Court of the United States.

The defendants assign the following errors in the record and proceedings in the said case:

1. The District Court erred in granting any final injunction herein against exacting from the plaintiff a certain agreement as a condition of issuing to it a license.

2. The District Court erred in granting any final injunction against prosecuting the plaintiff.

[fol. 145] 3. The District Court erred in refusing to dismiss the bill, and in each and every conclusion of law stated in its opinion and leading to the three errors previously assigned.

Because of the errors assigned above the defendants pray for a reversal of the final decree above mentioned. To that end they pray that a transcript of the record may be transmitted forthwith, in duly authenticated form, to the Supreme Court of the United States.

Dated December 11, 1934.

John J. Bennett, Jr., Attorney General; Henry Epstein, Solicitor General; Henry S. Manley, Counsel to the Department of Agriculture and Markets, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 146] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR CROSS-APPEAL AND ASSIGNMENT OF ERRORS—Filed Dec. 14, 1934

To the District Court of the United States for the Southern District of New York and to the Honorable Judges thereof:

The plaintiff, G. A. F. Seelig, Inc., being aggrieved by certain parts of the final decree of this Court entered No-

vember 21, 1934, in the office of the Clerk, respectfully prays an appeal therefrom to the Supreme Court of the United States.

The plaintiff assigns as the errors upon which it will rely that the District Court erred in denying in some respects the application for a final injunction, and erred in each conclusion of law stated in its opinion and leading to such denials.

Because of the errors assigned above, plaintiff prays for a reversal of so much of the final decree as in any way denies the relief prayed for in the Bill of Complaint and prays [fols. 147 & 148] that judgment be rendered in favor of the plaintiff as prayed for in the Bill of Complaint.

Dated December 14, 1934.

John J. O'Connor, Solicitor for Plaintiff.

[File endorsement omitted.]

[fol. 149] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL AND CROSS-APPEAL—Filed Dec. 14, 1934

The defendants in the above cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the final decree made in said suit by the District Court and entered in the office of its Clerk on November 21, 1934, and having presented their petition for appeal and assignment of errors; and

The plaintiff having prayed for the allowance of a cross-appeal from part of such final decree and having likewise presented its petition for cross-appeal and assignment of errors; and

The plaintiff and defendants having presented their joint statement as to jurisdiction as required by Rule 12 of the Supreme Court of the United States; it is

Ordered, that the appeal prayed for by the defendants, and the cross-appeal prayed for by the plaintiff, be and the same hereby are allowed; and it is further

Ordered, that the Clerk of the District Court prepare and certify a transcript of the record in this cause and transmit the same to the Supreme Court of the United States so that it shall have the same within forty days from this date; and it is further

[fol. 150] Ordered, that security for costs be, and the same hereby is, dispensed with upon the appeal and the cross-appeal, by consent of the respective solicitors.

Dated December 14, 1934.

Robert P. Patterson, United States District Judge.

The parties hereby consent to the granting of the foregoing order allowing an appeal and cross-appeal without the necessity of filing any security for costs on either side.

John J. O'Connor, Solicitor for Plaintiff; Henry S. Manley, Solicitor for Defendants.

[File endorsement omitted.]

[fol. 151] Citation in usual form, showing service on John J. Bennett, Jr., and Henry S. Manley, filed Dec. 14, 1934, omitted in printing.

[fols. 152 & 153] Citation in usual form, showing service on John J. O'Connor, filed Dec. 14, 1934, omitted in printing.

[fol. 154] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated on behalf of the respective parties to the appeal and cross-appeal herein, that the annexed transcript is a correct copy of the original papers on file with the United States District Court and contains all that is essential to the appeal and cross-appeal.

John J. O'Connor, Solicitor for Plaintiff, as Appellee and Cross-appellant; Henry S. Manley, Solicitor for Defendants, as Appellants and Cross-appellees.

[fol. 155] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 156] SUPREME COURT OF THE UNITED STATES

No. 604. No. 605

STATEMENT OF POINTS, ETC.—Filed Jan. 2, 1935

Pursuant to Rule 13, paragraph 9 of the Rules of this Court, the solicitor for each of the respective parties to the above entitled appeals each adopts its assignment of errors as its statement of points to be relied upon, and represents that the whole of the record as filed is necessary as a joint record for the consideration of both appeals, excepting from printing any duplication of the exhibits referred to [fols. 157 & 158] in the Submission of Motions and Stipulation of Facts'' and also omitting from printing the text of Chapter 158 of New York Laws of 1933 and of Chapter 126 of New York Laws of 1934.

Henry S. Manley, Solicitor for Appellants in #604 and for Appellees in #605. John J. O'Connor, Solicitor for Appellant in #605 and for Appellees in #604.

[fol. 159] [File endorsement omitted.]

Endorsed on cover: File No. 39,232, 39,233. D. C. U. S., S. New York. Term No. 604. Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., etc., Appellants, vs. G. A. F. Seelig, Inc. Term No. 605. G. A. F. Seelig, Inc., Appellant, vs. Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., etc. Filed December 27, 1934. File No. 604, O. T., 1934; 605, O. T. 1934.